Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ALACOQUE COLETTE KELLY,

Petitioner,

v.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA and ELLEN BLACKSTOCK,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions in this case involve an exemption under the California Fair Employment and Housing Act ("FEHA") which permits "religious associations and corporations" to discriminate against or harass employees on the basis of sex, age, race, national origin, ancestry, color, disability and religion. *Govt. Code* § 12926(d). No other non-profit employer is exempt under California law.

Thirteen other states afford similarly broad exemptions to religious employers. Seven of these thirteen states exempt religious employers and no other non-profit employer.

In contrast, federal law permits religious employers to discriminate only on the basis of religion. 42 *U.S.C.* § 2000e-1. 29 *U.S.C.* § 630(b).

The questions presented are:

1. Do these broad state exemptions constitute unjustified government favoritism of religion, thus violating the Establishment Clause of the United States Constitution?

2. Did the California Supreme Court violate the Establishment Clause of the United States Constitution by permitting certain quasi-secular employers, claiming religious missions and affiliations, to discriminate on the basis of non-religious characteristics while denying their secular, non-profit counterparts the same latitude?

3. Do these broad statutory exemptions granting the right to discriminate, based on age and other immutable

QUESTIONS PRESENTED – Continued

or suspect characteristics, violate the Equal Protection Clause of the United States Constitution by denying those individuals employed by religiously-affiliated entities, and only those individuals, the right to equal protection of the law?

4. Did the California Supreme Court violate the Equal Protection Clause of the United States Constitution by denying those individuals employed by quasi-secular, religiously-affiliated entities the right to seek protection from discrimination?

5. Is the freedom to discriminate, based on age and other immutable, non-religious characteristics, reasonably related to any claim of religious mission, belief and practice by a religiously-affiliated, quasi-secular employer?

6. Do Title VII and the Age Discrimination in Employment Act ("ADEA") preempt the FEHA exemption under the Supremacy Clause of the United States Constitution?

7. Does federal law preempt state discrimination law when the latter is a) inconsistent with the objectives of federal law, b) silent on practices otherwise forbidden by federal law, or c) only when it is impossible to comply with both state and federal law?

8. When Petitioner has been deprived of any legal remedy under FEHA, may she seek relief based on the public policy of the Age Discrimination in Employment Act ("ADEA")?

PARTIES TO THE PROCEEDINGS BELOW

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INTRODUCTORY PRAYER

Petitioner, Alacoque Colette Kelly, prays that the Court issue a Writ of Certiorari to review the judgment and opinions of the California Supreme Court and the California Court of Appeal in this case.

CITATIONS TO OPINIONS BELOW

The California Court of Appeal opinion was reported in 52 Cal. Rptr. 2d 177, 70 *Fair Employment Practices Cases* (BNA) 739, 82 *Fair Employment Practices Cases* (BNA) 1543, 61 Cal. Comp. Cases 340, 96 Cal. Daily Op. Serv. 2749 and 96 *Daily Journal D.A.R.* 4479 and is printed in the Appendix at App. 30a-51a and 71a-73a. The California Supreme Court decision was reported in 22 Cal. 4th 1108, 997 P.2d 1169, 82 *Fair Employment Practices Cases* (BNA) 1544, 65 Cal. Comp. Cases 494, 00 Cal.Op.Serv. 3717, 2000 *Daily Journal* D.A.R. 4951, *The Los Angeles Times* § A-3 (5/12/00) and the *California Employment Monitor*, Vol. 10, No. 7 (6/12/00) and is printed in the Appendix at App. 1a-29a.

JURISDICTION

On June 28, 2000, the judgment of the California Supreme Court became final when the Court denied Appellant's Petition for Rehearing. (App. 68a).

The United States Supreme Court has jurisdiction under 28 *U.S.C.* § 1257(a). Petitioner notes that 28 *U.S.C.*

§ 2403(b) may apply and that this document has been concurrently served on the California Attorney General pursuant to U.S. Supreme Court Rule 29(4)(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Equal Protection Clause is set forth in the United States Constitution, Amendment XIV, § I:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."

The Establishment Clause is set forth in the United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion."

The Establishment Clause is applicable to state action under the Fourteenth Amendment. *Everson v. Board of Education*, 330 U.S. 1, 8, 14-15, 67 S.Ct. 504, 91 L.Ed.2d 711 (1947).

The Supremacy Clause is set forth in the United States Constitution, Article VI:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby,

> anything in the Constitution or laws of any State to the contrary notwithstanding."

Despite recent amendments effective January 1, 2000, the California Fair Employment & Housing Act ("FEHA") continues to exempt "religious associations and corporations" permitting them to discriminate against or harass employees on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex or age.[1] *Government Code*, §§ 12926(d) & 12940(h)(3)(B). (App. 77a-78a). No other non-profit entity is afforded this exemption.

There are seven states which similarly afford this exclusive benefit to religious employers, exempting them from all state employment discrimination laws: Arkansas, Colorado, Connecticut, Missouri, Utah, Washington and Wyoming. (App. 81a-82a). There are six other states, which exempt both religious employers and other non-

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[1] This amendment became effective January 1, 2000 and is not retroactive. The issues, raised herein, are not moot. FEHA continues to broadly exempt all "religious corporations and associations" except for health care facilities operated by religious associations or corporations. The broad exemption of FEHA continues to be applicable to parochial schools and religiously-affiliated universities, retirement homes, day care centers, newspapers, radio stations, thrift stores and soup kitchens. FEHA also continues to permit discrimination against executives of health care facilities on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status or sex. *Cal. Govt. Code*, § 12926.2. (App. 79a-81a).

profit employers from all state employment discrimination laws: Alaska, Indiana, Kansas, Louisiana, Montana and New Hampshire. (App. 83a-84a).

In contrast, federal law permits religious employers to discriminate only on the basis of religion. 29 *U.S.C.* § 630(b). 42 *U.S.C.* §§ 2000e-1 & 2000e-2(e)(2). (App. 75a-76a).

STATEMENT OF THE CASE

A. THE PARTIES

Petitioner Alacoque Collette Kelly was a licensed vocational nurse and formerly employed by Respondent Methodist Hospital of Southern California (the "Hospital"). Respondent, Ellen Blackstock, was Petitioner's supervisor.

B. CLAIMS AND FACTS IN THE TRIAL COURT

This case arises from the entry of summary judgment in favor of the Hospital. The facts are well summarized in the opinion of the California Supreme Court and need not be reiterated. (App. 3a-6a). The trial court found that the Hospital was exempt from the public policy of the FEHA, as a "religious corporation not organized for profit" and that Petitioner's claim for wrongful termination in violation of that public policy had no merit. (App. 52a-67a).

C. PROCEEDINGS IN THE CALIFORNIA COURT OF APPEAL

The California Court of Appeal affirmed the entry of summary judgment on the same grounds. (App. 30a-47a, 51a). The Court of Appeal also held that the ADEA could not supply a public policy for a state wrongful termination claim and that the preemption question had no merit. (App. 45a-46a).

D. PROCEEDINGS IN THE CALIFORNIA SUPREME COURT

The California Supreme Court affirmed the entry of summary judgment, explicitly rejecting a construction of the FEHA exemption consistent with the more limited Title VII exemption and compatible with "Constitutional injunctions against establishment of religion." (App. 11a-16a). Rather, the Court held that any quasi-secular institution, having a "colorable" religious motivation and substantial "bona fide" religious affiliations, was entitled to discriminate on the basis of age and other non-religious characteristics. No other non-profit entity received similar favorable treatment from the Court. (App. 13a, 15a-17a, 24a-25a).

By elevating those employers having religious missions and religious affiliations above their secular counterparts, the California Supreme Court has promoted and sponsored religion in violation of the Establishment Clause.

The Court has provided unjustifiable awards of assistance to quasi-secular entities which claim religious missions and religious affiliations. By exempting these entities, the Court has permitted hospitals, retirement homes, nursing homes, thrift stores, schools, universities, newspapers and colleges of business and health science to discriminate on the basis of age and other non-religious characteristics. This type of broadly construed exemption, applicable to quasi-secular business activities, immunizes virtually every endeavor undertaken by a religious organization, thereby sheltering a myriad of activities which possess not the slightest claim to First Amendment protection. *King's Garden v. Federal Communications Commission*, 498 F.2d 51, 54-57 (D.C. Cir. 1974).

The ability of these non-profit, quasi-secular businesses to discriminate on the basis of age and other non-religious characteristics is unrelated to their claimed religious mission. The ability to discriminate, based on age, race, sex, color, national origin, ancestry, disability, medical condition and marital status, is equally unrelated to any exercise of religious belief and practice. When religiously-affiliated employers operate secular businesses, most of the employees will perform secular, rather than religious, functions. The free exercise concerns which are present when religious entities perform religious functions are absent. A broad exemption, applicable to quasi-secular businesses and not reasonably limited to religious discrimination, exceeds the bounds of permissible accommodation. This exemption, as applied by the California Supreme Court, denies the employees of exempt entities the right to seek protection from discrimination and it

violates the Equal Protection Clause of the United States Constitution.

E. THE MANNER AND TIME OF RAISING THE FEDERAL QUESTIONS

Each of the federal issues raised in this Petition for Writ of Certiorari was first raised in the California Court of Appeal. The ADEA and preemption issues were raised in Petitioner's Reply Brief and these issues were specifically considered and decided on the merits by that court. (App. 45a-46a). The Equal Protection Clause and Establishment Clause issues were first raised in the Petition for Rehearing. (App. 98a-101a).

All of these issues were properly and timely raised in the Court of Appeal. California law permits state appellate courts to consider and decide legal theories and questions of law first raised on appeal under a "de novo" standard, applicable to review of summary judgments. *Buss v. Superior Court*, 16 Cal. 4th 35, 60 (1997). *Ward v. Taggart*, 51 Cal. 2d 736, 742 (1959).

California law also permits state appellate courts to consider constitutional issues first raised on appeal when they pertain to important issues of public policy. *County of Orange v. Ivansco*, 67 Cal. App. 4th 328, 331 (1998). *Bonner v. City of Santa Ana*, 45 Cal. App. 4th 1465, 1476 (1996).

Additionally, California law permits state appellate courts to consider and decide legal issues first raised on appeal when there is an intervening change in decisional law. *Meier v. Ross General Hospital*, 69 Cal.2d 420, 423

(1968). In the subject case, there was an intervening change in the law when the California Supreme Court issued its decision in *Smith v. Fair Employment & Housing Commission*, 12 Cal.4th 1143 (1996).

In the *Smith* case, the Court held that a landlord's religious beliefs did not relieve her from FEHA's prohibition of discrimination in housing. Based on this analysis, Petitioner concluded that the FEHA exemption was not a reasonable accommodation of religious belief and practice. Rather, the FEHA exemption constituted unjustified government favoritism of religion, which violated both the Establishment Clause and the Equal Protection Clause. (App. 98a-101a). These federal issues were timely raised in the Court of Appeal.

In the California Supreme Court, Petitioner again raised each of the federal issues. (App. 102a-106a). The Court granted review on *all* of the federal issues, which were extensively briefed by all the parties and amici.[2] (App. 107a; 108a-118a). After considering these issues for approximately four years, the California Supreme Court stated, in a footnote, that it would not address the constitutionality of the religious entity exemption because the arguments had not been "properly preserved in the lower courts." (App. 2a; 119a-121a).

This artful evasion of controversial constitutional questions is not based on any rule of jurisdictional

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[2] Excerpts are attached in the Appendix at 108a-118a. The complete transcribed copies of Petitioner's Briefs are available at www.jurisearch.com.

preclusion. *California Rule of Court* 29(b) permits the California Supreme Court to hear and decide any issue which is first raised in the Court of Appeal in a petition for rehearing. (App. 91a). In fact, the California Supreme Court's own decisions permit it to decide a case on any issue, whether raised by counsel or not. *Burns v. Ross*, 190 Cal. 269, 275-276 (1923).

This Court may properly consider all of the federal issues presented in this Petition for Certiorari. State rules of discretionary procedure cannot deprive this Court of the right to review the state court decision. *Barr v. City of Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964). The assertion of federal rights, when plainly and reasonably made, is not to be defeated under color of local practice. *Wright v. Georgia*, 373 U.S. 284, 289-291, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963). When there has been substantial compliance in both substance and form, consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule. *National Association for the Advancement of Colored People v. Alabama*, 377 U.S. 288, 297, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964).

REASONS FOR GRANTING THE WRIT

A. THE ISSUES IN THIS CASE HAVE WIDE APPLICABILITY AND INVOLVE COMPELLING PUBLIC POLICIES

The resolution of the issues presented in this case is particularly important. The public policy against age discrimination is one which will significantly affect every individual. Unlike other stereotypes, old age is one which

every person will share, absent premature demise. When employers are allowed to terminate employees on the basis of age, society loses the benefit of their accumulated experience, wisdom and skills. There may also be adverse economic consequences when skills are not passed on from generation to generation and, in circumstances where older persons do not have financial reserves, government subsidies may have to sustain those older unemployed persons.

A decision by this Court would have a far-reaching impact on the many individuals who work for religiously-affiliated employers, many of whom operate in a manner akin to their secular counterparts, generating significant revenues in the commercial market. As an example, Catholic Healthcare West ("CHW") reported $4.4 billion in sales revenues and $82 million in net income for the fiscal year of 1999. In fact, CHW has been listed by *Hoover's Online The Business Network* as one of the top five hundred corporations in this country.

Based on information available from internet sources, Petitioner estimates that approximately 50% of all hospitals in the country have religious affiliations. Religiously-affiliated hospitals are found in every state and they have ties to the following faiths: Catholic, Adventist, Baptist, Presbyterian, Methodist, Jewish, Lutheran and Episcopalian. CHW alone reports 50 hospitals and more than 38,000 employees in the states of California, Arizona and Nevada. There are also at least, and possibly more than, 142 Catholic hospitals in Illinois and the Central, Southeast, Mid-Atlantic, South and Great Lakes regions. The Adventists have 5 health systems and 65 hospitals, located throughout nineteen states.

In terms of religiously-affiliated schools, the Department of Education reports that 21,000 of the 27,000 private schools in this country are religiously-affiliated. There are many other religious-affiliated employers who would also be impacted by a decision in this case, including universities, colleges, nursing homes, newspapers, day care centers, radio stations, thrift stores and even soup kitchens. (See the opinion of the California Supreme Court at 24A).

The issues in this case have wide applicability. Forty-one states provide exemptions for religious employers. (App. 77a-90a). Thirteen of these states allow religious employers to discriminate on the basis of age, sex, race and other non-religious characteristics. (App. 77a-84a). Additionally, courts are frequently asked to imply exemptions when religious employers are sued for discrimination and other employment-related claims. (App. 123a-140a).

Despite the proliferation of these exemptions, no judicial consensus has yet emerged on the point at which a religious employer's right to free exercise must yield to the public's compelling interest in eradicating employment discrimination and the constitutional requirements of equal protection. The subject case presents opportunities for this Court to specify the nature of the free exercise interests which would justify an exemption from employment laws, to define the parameters of impermissible and permissible accommodation, to clarify the applicable test for Establishment Clause challenges and, as discussed herein, to resolve substantial conflicts in the lower courts on these issues.

The subject case does not involve the highly specific factual settings of school aid, school prayer, or the use of religious symbolism. Rather, this case presents this Court with an opportunity to formulate a general test for Establishment Clause challenges. Such a test may then be applied to a wide variety of exemptions from employment laws, zoning laws, property tax, sales tax, medical insurance laws, solicitation statutes, licensing laws, punitive damages and statutes of limitation. (App. 77a-90a, 92a-97a, 123a-140a).

B. THE DECISIONS BY THE CALIFORNIA SUPREME COURT AND CALIFORNIA COURT OF APPEAL CONFLICT WITH DECISIONS BY THIS COURT AND ARE IN ERROR.

In *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 329-340, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987), this Court held that church-owned corporations could discriminate on the basis of religion in their secular, non-profit activities. This Court held that the limited Title VII exemption violated neither the Establishment Clause nor the Equal Protection Clause.

This Court did not hold that a right of religious autonomy was sufficient justification for employment discrimination based on sex, age, race, national origin, disability or any other non-religious characteristic. *Id.* at 329-340. This Court did, however, suggest that regulation of non-profit activities provided by churches to further their religious mission might have a chilling effect on the manner in which they defined their religious mission. *Id.* at 340-348. In *National Labor Relations Board v. Catholic*

Bishop of Chicago, this Court also recognized a right of religious autonomy, holding that the process of inquiry could chill the manner in which religious employers conducted their business. *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 502, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979),

In the subject case, the California Court of Appeal apparently adopted the view that the mere existence of a religious mission, or autonomy interest, justified an exemption from employment regulation.[3] (App. 43a). The California Supreme Court adopted a similar view, apparently borrowing language from *Corporation of Presiding Bishop v. Amos*, that any non-profit operation would have a "colorable" claim that it was not purely secular in orientation. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 340-342 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987), (Brennan, J., concurring).

Under the California Supreme Court's test, a non-profit entity need only show a "colorable" religious mission and substantial "bona fide religious" affiliations in order to be exempt from FEHA. If employers are able to satisfy these attributes of religious autonomy, they are then entitled to discriminate on the basis of age and other non-religious characteristics.

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[3] See, for example, the Court's comments: " . . . it is far from clear that religiously affiliated hospitals serve a primary secular purpose, as plaintiff contends. To many religious adherents, healing of the sick is closely associated with faith in a divine being. Many hospitals, even those without an official religious affiliation, offer on site chapels and chaplains for the spiritual comfort of their patients and their families. This hospital . . . broadcasts daily religious sermons to its patients' rooms." (See App. 43a).

These interpretations in the subject case are erroneous and in conflict with several decisions of this Court. The mere existence of a religious mission does not insulate entities from governmental regulation. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985). *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990). Further, a right of religious autonomy does not preclude judicial resolution of internal disputes of religious entities when based on neutral principles of law. *Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979).

The proper inquiry is not the religious motive of the entity in conducting quasi-secular business operations. The proper inquiry is whether government regulation would substantially burden the exercise of religious belief or practice and whether government regulation would *actually* interfere with the claimed religious mission. In the absence of any actual burden on religious mission, belief or practice, this broad exemption is simply government endorsement of religion. *Texas Monthly v. Bullock*, 489 U.S. 1, 15, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989).

C. THERE IS A SUBSTANTIAL CONFLICT ON THE NATURE OF THE FREE EXERCISE INTERESTS WHICH WOULD JUSTIFY AN EXEMPTION FROM EMPLOYMENT LAWS AND ON THE SCOPE OF PERMISSIBLE ACCOMMODATION.

There are substantial conflicts in the lower courts on whether a religious autonomy interest alone justifies an exemption from laws which prohibit discrimination on

the basis of age, sex, race and other non-religious characteristics.

The Ninth Circuit has adopted the view that a mere autonomy interest did not bar a priest's claim of sexual harassment. The Court noted that any law necessarily interferes with the unfettered autonomy which religious institutions would otherwise enjoy and that this sort of generalized and diffuse concern does not exempt them from discrimination laws. Otherwise, religious institutions would be free of all secular and legal obligations that currently and routinely apply to them. *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999).

Approximately thirty-five courts have similarly held that religious employers may be sued for sexual harassment, discrimination based on age, sex, race, pregnancy, national origin and sexual orientation, retaliation, and other employment-related issues. [See, for example, *Weismann v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994) and the authorities listed in the Table at App. 123a-128a; 139a-140a]. These courts include the following: the Courts of Appeals in the District of Columbia and in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits and the Supreme Courts of New Jersey and New Hampshire.

Approximately thirty-four lower courts have implied exemptions when religious employers have been sued for sexual harassment, discrimination based on sex, pregnancy, race, disability and age, retaliation, and other employment-related issues. [See, for example, *Kelly v. Methodist Hospital*, 22 Cal.4th 1108 (2000) and the other

authorities listed in the table at App. 128a-131a; 136a-139a]. These courts include the Supreme Courts of the following states: Alaska, California, Colorado, Iowa, Kentucky, Maine, Massachusetts, Missouri, Montana and Wisconsin. These courts also include the Courts of Appeals in the First, Fourth, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits and the District of Columbia.

In those cases which do involve a religious justification for a challenged employment decision, there is an additional conflict in the courts. The Second, Third, Sixth and Ninth Circuits have opined that courts may evaluate whether a religious motive is, in fact, the actual motive for an employment decision.[4]

Likewise, in *Dayton Christian Schools v. Ohio Civil Rights Commission*, 477 U.S. 619, 628, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986), this Court unanimously stated that the Ohio Civil Rights Commission could investigate a teacher's discharge in order to ascertain whether the ascribed religious reason was, in fact, the reason for discharge. The Courts of Appeals in the Third, Sixth and Seventh Circuits have conflicting views and hold that courts may not question religious justifications for

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[4] See, for example, *EEOC v. Pacific Press Publishing Assn.*, 676 F.2d 1272 (9th Cir. 1982). (Retaliation). *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000). (Pregnancy discrimination). *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993). (Age discrimination). *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3rd Cir. 1993). (Age discrimination).

challenged employment actions.[5] This view finds support in a decision by this Court, holding that government may not inquire into the truth or verity of religious doctrine or belief. *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 88 L.Ed. 1148 (1944). Relying on the *Ballard* case, some courts have even held that an entity's characterization of its status must be accepted by the courts unless found to be insincere or a sham. *Klein v. Hartnett*, 585 N.E.2d 809, 815 (1991). (Unemployment insurance exemption). *Holy Trinity Community School v. Kahl*, 262 N.W.2d 210 (1978). *Kelly v. Methodist Hospital*, 22 Cal.4th 1108 (2000). (App. 22a, fn. 7).

Although the California Supreme Court indicated that an entity's characterization of itself must be accepted unless insincere or a sham, it also held that the articles of incorporation by which an entity defines itself were not controlling. Specifically, the Court stated that the "omission of specific religious language in the articles of incorporation does not negate the religious motivation underlying the creation and operations of (the) Hospital." (App. 20a) In adopting this position, the Court explicitly

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[5] See, for example, *Boyd v. Harding Academy of Memphis, Inc.*, 87 F.Supp. 157 (W.D.Tn. 1995); *affirmed in* 88 F.3d 414 (6th Cir. 1996), exempting religious school from a pregnancy discrimination suit. See also *McGuire v. Marquette University*, 814 F.2d 1213 (7th Cir. 1987), exempting religious university from claim of sex discrimination suit and *Little v. Wuerl*, 929 F.2d 944 (3rd Cir. 1991), claim of religious discrimination included religious school's decision not to re-hire teacher based on re-marriage.

rejected a construction of "religious corporation" compatible with the case of *Bradfield v. Roberts*, 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168 (1899). (See App. 16a at footnote 6).

There are also no clear answers as to how religious an entity must be in order to qualify for a Title VII religious employer exemption. The Courts of Appeals in the Second, Third, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits, the Supreme Courts of Washington and Hawaii and New York's Court of Appeal have broadly construed the religious employer exemption. (App. 131a-134a). In contrast, the Courts of Appeals in the Fourth and Ninth Circuits and the Supreme Court of Connecticut have adopted a narrow construction (App. 134a-135a).

Further, there are conflicts as to whether universities, hospitals, nursing homes, schools and homes for neglected children are sufficiently religious for purposes of avoiding jurisdiction by the National Labor Relations Board.[6]

Petitioner respectfully requests that this Court resolve the above conflicts. A decision would assist the lower courts in assessing the free exercise interests which

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[6] See, for example, *Universidad Central de Bayamon v. National Labor Relations Board*, 793 F.2d 383 (1st Cir. 1986). *National Labor Relations Board v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981). *St. Elizabeth Hospital v. National Labor Relations Board*, 715 F.2d 1193 (7th Cir. 1983). *National Labor Relations Board v. Hanna Boys Center*, 940 F.2d 1295 (9th Cir. 1991). *St. Elizabeth Community Hospital v. National Labor Relations Board*, 708 F.2d 1436 (9th Cir. 1983). *Tressler Lutheran Home for Children v. National Labor Relations Board*, 677 F.2d 302 (3rd Cir. 1982).

would justify an exemption from employment laws. Further, a decision would provide guidance to the lower courts on whether an employer was sufficiently religious to be exempt from employment laws.

D. THERE ARE SUBSTANTIAL CONFLICTS ON THE APPLICABLE TEST FOR ESTABLISHMENT CLAUSE CHALLENGES

This Court has previously noted that Establishment Clause jurisprudence is in a hopeless state of disarray and in need of substantial revision. *Rosenberger v. University of Virginia*, 515 U.S. 819, 861, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). (Thomas, J. concurring). *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 656, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). (Kennedy, J. concurring in part and dissenting in part).

Different tests have been articulated by this Court at various times and there is substantial conflict in the lower courts as to the proper test to be used for Establishment Clause analysis.

In the traditional "Lemon test," an exemption must have a secular purpose; it must have a primary effect that neither advances religion, nor inhibits religion; and it must avoid fostering excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). If an exemption fails any prong of this tripartite test, it violates the Establishment Clause. *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987).

In the "Texas Monthly" test, an exemption violates the Establishment Clause when it cannot reasonably be seen as lifting an identifiable and significant state-imposed burden on religious belief or religious practice. Alternatively, an exemption violates the Establishment Clause when it provides a special benefit to religious entities and imposes a burden on non-beneficiaries. *Texas Monthly v. Bullock*, 489 U.S. 1, 14-15, 18, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989). This test has been adopted by the Courts of Appeals in the Seventh and Eighth Circuits. *Cohen v. City of Des Plaines*, 8 F.3d 484, 492 (7th Cir. 1993). (Zoning exemption). *Children's Healthcare is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1093 (8th Cir. 2000). (Exemption from Medicare and Medicaid Acts).

In the "Amos" test, Establishment Clause violations are limited to cases in which government has itself advanced religion through its own activities or influence. Thus, when government passively leaves religion where it found it, it has not made a law with respect to religion. *Amos*, 483 U.S. 327, 335-337, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987). [Quoting from *Walz v. Tax Commissioner*, 397 U.S. 644, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)]. This test has been adopted by the Courts of Appeals in the First, Fourth and Seventh Circuits, the Supreme Court of Vermont and the New York Courts of Appeals. *Boyajian v. Gatzunis*, 212 F.3d 1, 10 (1st Cir. 2000). *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.* 2000 WL 1144595 (4th Cir. 2000). *Cohen v. City of Des Plaines*, 8 F.3d 484, 491-492 (7th Cir. 1993). (Zoning exemptions). *Klein v. Hartnett*, 585 N.E.2d 809, 814 (1991). (Unemployment insurance exemption). *Chittenden v. Waterbury Center*

Community Church, Inc., 726 A.2d 20, 26 (1998). (Exemption from statute of limitations).

In the *Amos* case, the concurring opinion articulates yet another Establishment Clause test. Under this test, an exemption afforded to the non-profit activities of religious entities accommodates the exercise of religion and does not violate the Establishment Clause. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 340-345, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987). (Brennan, J. concurring opinion). This test has been adopted by the Seventh Circuit. *Cohen v. City of Des Plaines*, 8 F.3d 484, 493 (7th Cir. 1993). (Zoning exemption).

In the "endorsement" test, one must ask whether the governmental action conveys a message of endorsement or approval of religion to an "objective observer." *Lynch v. Donnelly*, 465 U.S. 668, 690-694, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). (O'Connor, J. concurring opinion). *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 600-601, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). This "endorsement" test has been adopted by the Supreme Court of South Carolina and the Court of Appeals in the Tenth Circuit. *Thayer v. South Carolina Tax Commissioner*, 413 S.E.2d 810, 814 (1992). *Bauchman v. West High School*, 132 F.3d 542, 551-552 (10th Cir. 1997)

Under the "coercion" test, legitimate accommodation merely removes obstacles to the exercise of a religious conviction. Impermissible accommodation, in violation of the Establishment Clause, occurs when governmental action effectively coerces the adoption of a religious practice or conviction. *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). This test has been adopted

by the Fifth Circuit. *Doe v. Beaumont Independent School*, 173 F.3d 274, 290-291 (5th Cir. 1999). (Also adopting the "Lemon" test and the "endorsement test." *Id.* at 285-286).

In *Walz v. Tax Commissioner*, this Court provided yet another test for analyzing Establishment Clause challenges. Under this test, an exemption or benefit granted to both religious entities and secular entities is generally perceived as having a secular purpose. These types of exemptions provide only an incidental benefit to religion and do not violate the Establishment Clause. *Walz v. Tax Commissioner*, 397 U.S. 644, 672-673, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). This test has been adopted by the First and Sixth Circuits and the Court of Appeals of New York. *Rojas v. Fitch*, 127 F.3d 184, 188-189 (1st Cir. 1997). *Klein v. Hartnett*, 585 N.E.2d 809, 813 (1991). (Unemployment insurance exemption). *Dayton Area Visually Impaired Persons v. Fisher*, 70 F.3d 1474, 1483 (6th Cir. 1995). (Exemption from charitable solicitation act).

The subject case presents opportunities to resolve these conflicts.

E. THE CALIFORNIA SUPREME COURT'S DECISION, AS APPLIED, VIOLATES THE EQUAL PROTECTION CLAUSE AND CONFLICTS WITH DECISIONS BY THIS COURT

The subject case conflicts with other decisions by this Court. In *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), this Court held that religious belief did not compel an exemption when a law of general applicability imposed only an incidental burden on religious practice. In *United States v. Lee*, 455 U.S.

252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), this Court held that religious belief afforded no basis for resisting social security taxes. In *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), this Court held that religious and moral beliefs did not justify a broad law which denied homosexuals the right to seek protection from discrimination. Religious belief similarly affords no basis for discrimination on the basis of race. *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1974).

In the subject case, the California Supreme Court imposed a broad disability on employees of religiously-affiliated entities by denying those employees, and only those employees, the right to seek protection from discrimination based on suspect classifications such as race, ancestry, color, national origin, sex and age. These are immutable characteristics over which we have no control and these characteristics will rarely, if ever, bear any relationship to an employee's ability to perform a job for a quasi-secular, religiously-affiliated employer.

In contrast, religion is a matter of choice. Religious entities may legitimately prefer those who share their religious mission, beliefs and values. Laws which permit preferences for co-religionists relieve religious employers from potential government interference in their ability to define and carry out their religious mission. These laws are rationally related to a legitimate government objective. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338-340, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987).

In the subject case, the freedom to discriminate based on age, and other non-religious characteristics, is unrelated to religious mission, belief or practice. There is no rational reason to broadly exempt all quasi-secular, religiously-affiliated employers from all claims, based on a mere possibility that a religious justification might arise for a particular employment decision. The mere possibility that entanglement concerns might arise is likewise insufficient justification. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303-306, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985). *Jimmy Swaggert Ministeries v. Board of Equalization*, 493 U.S. 378, 392-397, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990).

A harm which endangers the ability of individuals to meaningfully contribute to society's economic well-being cannot be justified by any competing right of a religious entity to hire and fire employees on the basis of age and other non-religious characteristics. For this reason, there is neither a rational, nor a compelling, basis for the broad exemption afforded by the California Supreme Court.

F. THE SUBJECT CASE PRESENTS AN OPPORTUNITY TO RESOLVE CONFLICTS ON THE EXTENT TO WHICH FEDERAL DISCRIMINATION LAW PREEMPTS STATE DISCRIMINATION LAW

Substantial disagreements have previously arisen in this Court on the extent to which federal law should intrude on state policy-making rights and the extent to which federal law should displace state law. The scope of preemption in the area of discrimination law is unclear

and there are substantial disagreements in this Court's opinions.

In *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987), this Court held that Title VII did not preempt California's pregnancy discrimination law. This Court reasoned that the statutes shared a common objective, the achievement of equal employment opportunities, and that there was no preemption when the purposes of the statutes were not inconsistent with each other. 42 *U.S.C.* § 2000h-4. (App. 77a).

On separate grounds, this Court held that California law neither "required," nor "permitted," employers to discriminate against males. The Court reasoned that California employers were not barred from providing comparable leaves of absences to males. This Court held that there was no preemption because the pregnancy discrimination law did not "require" or "permit" a practice which was unlawful under Title VII. 42 *U.S.C.* § 2000e-7. (App. 77a).

The dissent, however, adopted a different interpretation and argued that state law "required" employers to single out pregnant women for preferential treatment, thus violating Title VII's prohibition against sex discrimination. *Id.* at 297-304. There was also disagreement over whether 42 *U.S.C.* § 2000e-7 should control in lieu of the more general preemption doctrine, espoused in 42 *U.S.C.* § 2000h-4. *Id.* at 295-296 (Scalia, J. concurring opinion).

In dictum, this Court reasoned that states were not required to incorporate every prohibition contained in Title VII into state law. This Court stated that Title VII did

not preempt state laws which were merely silent on the practice, but only those laws which expressly sanctioned practices unlawful under Title VII. *Id.* at 291 (at fn. 29).

In the subject case, Defendants argued that this language limits preemption to those cases in which it is impossible to comply with both state and federal law. Defendants argued that they are not required to discriminate on the basis of age and other non-religious characteristics and, therefore, they can comply with both federal and state discrimination law. The Court of Appeal apparently agreed when it found the preemption issue to have no merit. (App. 45a-46a).

This interpretation is not correct because it ignores the general preemption language, set forth in 42 *U.S.C.* § 2000h-4:

> "Nothing contained in any title of this Act . . . shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

This statute, 42 *U.S.C.* § 2000h-4, provides the basis for preemption in the subject case. The FEHA exemption is preempted by federal law because it is inconsistent with the federal purpose and objective of eliminating employment discrimination on the basis of sex, age, race, national origin, ancestry, color, disability, handicap, cancer-related medical condition, and pregnancy. *Id.* at 272.

The subject case gives this Court an opportunity to clarify its preemption doctrine in the area of employment discrimination. A decision on these issues would assist the forty-one states which provide exemptions to religious employers. (App. 77a-90a).

G. THE *ADEA* IS A SOURCE OF PUBLIC POLICY AND THERE ARE SUBSTANTIAL CONFLICTS IN THE LOWER COURTS

In the subject case, the Court of Appeal held that Plaintiff's claim for wrongful termination had no merit. The Court stated that it did not believe the federal age discrimination statute could supply a public policy basis for a state wrongful termination claim. (App. 46a).

This decision is an egregious misreading of federal law. Both the ADEA and FEHA articulate public policies against age discrimination. 29 *U.S.C.* § 621. *Govt. Code*, § 12920. (App. 74a; 79a). If FEHA has been validated as a source of public policy in a wrongful termination claim, the public policy of the ADEA is entitled to no less deference. (See, for example, *Stevenson v. Superior Court*, 16 Cal.4th 880 (1997), holding that employees could sue for wrongful termination in violation of FEHA's public policy against age discrimination). Federal law is an equally important source of public policy because it benefits the public at large when citizens comply with federal laws.

Where, as in the subject case, a state law affords no remedy for employees such as Petitioner, federal law should redress that injury based on its broad public policy. Where, as in the subject case, Petitioner is the chosen

vehicle by which the public redresses its injuries arising from discrimination, she should be encouraged to vindicate these policies on behalf of the public. The recognition of a wrongful termination action based on federal public policy promotes the objectives of federal law and furthers its implementation by relieving burdens of administrative enforcement on the government. If an employer has violated the public policy against age discrimination, it should be held accountable. There are substantial conflicts in the courts on these issues. The Supreme Courts of Oklahoma and Vermont, and the Court of Appeals in the Ninth Circuit, have recognized that both federal and state discrimination laws are sources of public policy in claims for wrongful termination. *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218 (1992). [Title VII]. *Payne v. Rozendaal*, 520 A.2d 586, 590 (1986). [ADEA]. *Bernstein v. Aetna Life and Casualty*, 843 F.2d 359 (9th Cir. 1988). [ADEA]. In contrast, the Court of Appeals in the First Circuit and the Supreme Court of New Hampshire have held that federal and state public policies against discrimination were not sufficient to support a claim of wrongful discharge. *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413 (1st Cir. 1996). [Title VII]. *Howard v. Dorr Woolen Company*, 414 A.2d 1273 (1980). [ADEA].

A decision by this Court on the federal policy issues would assist the lower courts when ruling on wrongful termination claims, particularly in cases where state law affords no remedy.

CONCLUSION

The federal policies against employment discrimination are compelling and more than deserving of this Court's protection. Equal opportunity in employment benefits society by fully utilizing the capabilities and skills of each individual. It promotes a stable economy, it reduces the burden of government welfare programs, and it promotes a sense of well-being in the community at large. Equal opportunity in employment recognizes that each individual has value and may contribute to society's advancement in a manner which is unique to that individual. For these reasons, legislatures and courts should imply exemptions from these laws for only the most compelling reasons.

In the subject case, the FEHA exemption is unabashed governmental favoritism which immunizes all secular operations of religious-affiliated employers from any and all liability for unlawful discrimination based on age, race, sex, national origin, ancestry, color, and other non-religious characteristics. This egregious violation of the Establishment Clause should not go unnoticed by this Court. Further, the FEHA exemption is so far removed from its stated objectives that it trammels the rights of all individuals seeking equal employment opportunity and constitutes a flagrant violation of the Equal Protection Clause.

For the reasons, set forth herein, Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioner
Alacoque Colette Kelly

Dated: September 26, 2000

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COPY

IN THE SUPREME COURT OF CALIFORNIA

ALACOQUE COLETTE KELLY, Plaintiff and Appellant, v. METHODIST HOSPITAL OF SOUTHERN CALIFORNIA et al., Defendants and Respondents.	S053888 Ct. App. 2/1 B089833 Los Angeles County Super. Ct. No. GC 005963 (Filed May 11, 2000)

The Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)[1] bars discrimination by employers on several enumerated bases. Under section 12926, subdivision (d) (the religious-entity exemption), the term "employer" specifically excludes "a religious association or corporation not organized for private profit."[2] In

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[1] All further statutory references are to the Government Code unless otherwise specified.

[2] On October 9, 1999, the Governor signed into law Assembly Bill No. 1541 (1999-2000 Reg. Sess.), which revised the religious-entity exemption by adding sections 12922 and 12926.2 to the Government Code. (Stats. 1999, ch. 913, §§ 1, 2.) Section 12922 provides that an "employer that is a religious corporation may restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized." Section 12926.2 provides statutory definitions for the terms "religious corporation," "religious duties" and "employer." That section further provides that employers covered by FEHA include "a religious corporation or association with respect to persons employed by the religious association or corporation to perform duties, other than

McKeon v. Mercy Healthcare Sacramento (1998) 19 Cal.4th 321 (*McKeon*), we determined that a hospital controlled by the Roman Catholic Church could invoke the religious-entity exemption even though not officially incorporated as a nonprofit religious corporation under Corporations Code section 9110 et seq. No other factual or legal arguments were at issue in *McKeon*.

In the present case, plaintiff asserts that her former employer, a different religiously affiliated hospital, fails to qualify for the religious-entity exemption under its previous incarnation because the hospital's purpose and affiliations are inadequately religious.[3] We disagree.

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religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation." (§ 12926.2, subd. (c).)

These modifications to the religious-entity exemption went into effect on January 1, 2000. While it is not this court's ordinary practice to issue opinions construing superseded statutory language, the parties have identified several unrelated actions the resolution of which also revolves around the proper construction of the former version of the exemption. In addition, numerous lawsuits may be pending of which the parties are unaware, and additional civil actions may arise out of administrative complaints previously filed with the Department of Fair Employment and Housing. Consequently, we feel it appropriate to retain and resolve the fully briefed matter before us. In so doing, we express no view regarding the scope of the religious-entity exemption as modified by Assembly Bill No. 1541.

[3] The petition for review and briefing raise several additional arguments concerning the constitutionality of the religious-entity exemption. Because these arguments were not properly preserved in the lower courts, we do not address them

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff, a nurse at defendant Methodist Hospital of Southern California (Hospital), was discharged in 1991 on the grounds that she had failed to return to work after the expiration of her medical leave, despite having received five extensions of time to do so. Plaintiff was 50 years old at the time of her discharge. She filed a lawsuit against the Hospital and her immediate superior, alleging, among other things, that her termination was based on her age. While she did not seek direct relief under FEHA, she did allege that her termination violated California's fundamental public policy against age discrimination as expressed in FEHA. (See *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167 (*Tameny*).) *Tameny* claims permit wrongful termination damages when a termination is undertaken in violation of a fundamental, substantial and well-established public policy of state law grounded in a statute or constitutional provision. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094-1095.)

Hospital moved for summary judgment, arguing it is a religious corporation not organized for private profit and is thus expressly excluded from FEHA under the religious-entity exemption. Relying on our decision in *Jennings v. Marralle* (1994) 8 Cal.4th 121, 135-136, in which we held that a FEHA-based *Tameny* claim would not lie against an employer who is specifically exempt from the scope of FEHA, Hospital argued that, because no state law other than FEHA proscribes age discrimination and

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in this opinion.

Hospital is not subject to FEHA restrictions, no public policy basis exists for a *Tameny* claim against Hospital.

In support of the motion for summary judgment, Hospital presented evidence of its creation by and affiliation with the United Methodist Church. Under Hospital's articles of incorporation, all of its assets are irrevocably dedicated to charitable and religious purposes, and upon its dissolution those assets revert to the United Methodist Women. Hospital's directors are elected annually at a meeting of the Woman's Society of Christian Service of the Southern California-Arizona Conference of the Methodist Church. Under Hospital's bylaws, a majority of its board members must be members of the United Methodist Church and one member of the board must be a Methodist minister. The president of the United Methodist Women is also a board member by virtue of her office. In lieu of shareholders, Hospital has "members" who vote on significant issues affecting Hospital. The only persons eligible to be members are those individuals currently serving on the board of directors and those individuals currently serving on the Executive Committee of United Methodist Women.

A Methodist chaplain ministers to the religious needs of patients in the Hospital, and Hospital broadcasts a daily in-house sermon for the benefit of patients, staff and visitors. Hospital abides by the requirements of the Health and Welfare Ministry of the United Methodist Church and is accredited by the Certification Council of the United Methodist Church.

In addition, Hospital demonstrated it is exempt from federal taxation as a corporation "organized and operated

exclusively for religious, charitable . . . or education purposes" as set forth in 26 United States Code section 501(c)(3) under an Internal Revenue Service ruling in effect since 1937. Hospital also noted that several years earlier the Fair Employment Practice Commission (the predecessor to the Fair Employment and Housing Commission (FEHC)) had dismissed a discrimination complaint against Hospital after determining that it lacked jurisdiction over the complaint.

Plaintiff opposed the summary judgment motion, arguing triable issues of fact remain as to whether Hospital is actually a "religious association or corporation not organized for private profit" within the meaning of section 12926. She asserted that Hospital is ineligible for the religious-entity exemption because it is a secular business involved in health care, not an organization dedicated to religious indoctrination or propagation of the Methodist faith. In factual support, she cited the testimony of Hospital's administrative director of human resources, who admitted that Hospital's "business" is "[c]aring for the health care needs of the community" and is not specifically related to religion. Plaintiff further relied on Hospital's articles of incorporation, which provide that the purposes of the corporation are to "establish, erect and maintain a hospital; to buy, own, hold and sell real estate; to receive, by donation or otherwise any real or personal property that may be deemed advantageous, desirable or necessary; to lease, mortgage, sell, or otherwise dispose of property; to establish and maintain a training school for nurses; to receive endowments and to invest the same; to establish and maintain free beds for those unable to

pay hospital charges; to maintain a dispensary; to establish and maintain branch hospitals and sanitariums; and to receive property and to pay annuities." In plaintiff's view, these are not religious purposes. Plaintiff also noted that Hospital does not require its patients or employees to profess the Methodist faith, nearly half the members of the board may be non-Methodist, and only one member of the board need be a Methodist minister. Plaintiff opined that this evidence created a triable issue of fact as to whether Hospital is truly a "religious association or corporation not organized for private profit" as that term was intended by the Legislature in section 12926.

The trial court concluded the evidence did not create a triable issue of fact as to whether Hospital is a "religious association or corporation not organized for private profit" within the meaning of section 12926. The court therefore granted the motion for summary judgment and entered judgment for Hospital. The Court of Appeal affirmed the judgment. We granted review.

II. DISCUSSION

Section 12940, subdivision (a) prohibits employers from discriminating against certain protected classes in compensation, terms, conditions or privileges of employment. Section 12926, subdivision (d) provides: " 'Employer' includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, . . . except as follows: [¶] 'Employer' does not include a religious association or corporation not organized for private profit." At the time

applicable to this action, the statute contained no other relevant definitions. (Stats. 1990, ch. 15, § 1, p. 87.)

We have previously stated general principles for interpreting the provisions of FEHA. "Because the FEHA is remedial legislation, which declares '[t]he opportunity to seek, obtain and hold employment without discrimination' to be a civil right (§ 12921), and expresses a legislative policy that it is necessary to protect and safeguard that right (§ 12920), the court must construe the FEHA broadly, not . . . restrictively. Section 12993, subdivision (a) directs: 'The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof.' If there is ambiguity that is not resolved by the legislative history of the FEHA or other extrinsic sources, we are required to construe the FEHA so as to facilitate the exercise of jurisdiction by the FEHC. [Citation.]" (*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 243 (*Robinson*).) Not all statutory interpretations, of course, are equally reasonable: the mere fact that one may make a theoretical and unsupported argument to broaden the scope of the statute or to narrow its exceptions does not necessarily mean the language at issue is legitimately susceptible of that interpretation. Our goal is to discern the apparent legislative intent in enacting the relevant version of the religious-entity exemption, not to adopt a judicial construction to give that exemption the meaning we might believe most salutary.

As we previously noted, "[t]o take advantage of the exemption, an entity apparently need only be 'religious' and 'not organized for private profit.' " (*McKeon, supra,* 19 Cal.4th at p. 326.) That Hospital is a corporation not organized for private profit is undisputed. Also certain

from the showing made by Hospital in support of its motion for summary judgment is that, at a minimum, Hospital was founded by a religious group, is affiliated with and to some extent controlled by that religious group and, if it is ever dissolved, its assets will revert to that religious group.

The legislative history of section 12926 provides little guidance in interpreting its meaning. Plaintiff suggests that in initially drafting the Fair Employment Practices Act, the predecessor to FEHA, and its exceptions, the Legislature had the power to enact language that would have expressly excluded religiously affiliated hospitals, but did not do so. She also notes that the Legislature in 1977 amended the act's exemptions, but did not take that opportunity to add clarifying language specifically providing that the religious-entity exemption applies to religiously affiliated hospitals. That the Legislature did neither of these things does not, however, create a legitimate inference that it did not intend to include religiously affiliated hospitals in the facially broad language of the religious-entity exemption along with other religiously affiliated entities. Standing alone, the failure to add additional language under these circumstances creates no inferences at all.

We previously explored the legislative history of FEHA in *Robinson, supra,* 2 Cal.4th at pages 236-243. When it was enacted in 1959, Labor Code former section 1413, subdivision (d), the predecessor statute to Government Code section 12926, provided: " 'Employer' does not include a social club, fraternal, charitable, educational or religious association or corporation not organized for private profit." (Stats. 1959, ch. 121, § 1, p. 2000.) As will

be discussed below, the first four of these categories of exempted employers were excised from the statute in a 1977 amendment, an amendment that left the language of the religious-entity exemption intact.

At different points in their briefing, plaintiff and supporting amicus curiae California Employment Lawyers Association (hereafter amicus curiae) advance three different ways in which the language of the exemption might be interpreted so as to permit plaintiff's claim against Hospital to go forward. First, the exemption might be interpreted to permit discrimination by religious entities only in situations where the religious faith of the employee is a legitimate requirement of the job in which the employee is engaged. As religious faith is not one of the qualifications legitimately required of a nurse, the exemption as thus interpreted arguably would be inapplicable to a claim by a nurse. Second, the exemption might be interpreted to permit religious entities to discriminate against all employees, whatever their position, provided the entity does so solely on the basis of religion. As plaintiff, however, claims age rather than religious discrimination, this postulated exemption arguably would be inapplicable to her claim. Finally, the exemption might be interpreted as applying only to churches and other proselytizing organizations that have a religious rather than secular purpose. Under this theory, if health care is viewed as a secular function, Hospital would be ineligible for the exemption despite its religious affiliations.

We have examined the statute, its legislative history and analogous authority to determine whether any support can be found for any of these readings in light of the

facially broad language of the prior version of the exemption which continues to be applicable to plaintiff's claim. We conclude no legitimate basis appears to exclude Hospital from the scope of the relevant version of the religious-entity exemption in any of these manners.

The first suggested interpretation, that the exemption is conditioned upon the nature of the employee's job position, is easily refuted. That interpretation clearly ignores the structure of the statute itself, which predicates potential FEHA liability on the status of the defendant as an "employer." (§ 12926.) The exemption renders qualified religious entities exempt from FEHA in its entirety. The nature of the employee's work is not relevant; the nature of the entity that employs him or her is determinative. Indeed, the Legislature specifically rejected an opportunity to narrow the scope of the exemption in precisely this manner when, in 1977, it amended Labor Code former section 1413, subdivision (d) to remove the statutory exemption for social, fraternal, charitable and educational associations. (Stats. 1977, ch. 1019, § 1, p. 3055.) The original version of the proposed amendment would have defined the term "employer" as "not includ[ing] a religious association or corporation when employing persons directly involved in carrying out the religious purposes of the religious association or corporation." (Assem. Bill No. 1047 (1977-1978 Reg. Sess.) § 1, as introduced Mar. 22, 1977.) Subsequent versions of the bill, however, abandoned this reformulation, and the Legislature ultimately retained the religious-entity exemption in precisely the same language as

before: "religious association or corporation not organized for private profit." (Stats. 1977, ch. 1019, § 1, p. 3055.)

The second proposed interpretation, that the religious-entity exemption permits such entities to discriminate only on the basis of religion, is equally unsupported by the terms of the statute. Only employers are subject to FEHA. Whether a religious entity, whatever that phrase may mean, is an employer is not dependent on the nature of the discrimination claim made against the entity. Amicus curiae nevertheless suggests that we follow a 1985 decision of the FEHC that concluded the religious-entity exemption applies only to allegations of religious discrimination, and only in situations where the religious faith of the employee is a legitimate job requirement. (*Department of Fair Employment and Housing v. Hoag Memorial Hospital Presbyterian* (1985) No. 85-10, FEHC Precedential Decs. 1984-1985, CEB 14 (*Hoag*).) The *Hoag* decision, however, is not a persuasive interpretation of the exemption, as it ignores the plain language of the statute.

Prior to the *Hoag* decision, the FEHC had interpreted the religious-entity exemption "to mean that a nonprofit organization is entirely exempt from [FEHA] if it can demonstrate that it is in fact religious in nature." (*Hoag, supra*, No. 85-10, FEHC Precedential Decs. 1984-1985, CEB 14, p. 7.) This understanding is reflected in a regulation promulgated by the FEHC in 1980, which provided that "any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under [FEHA]." (Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(5).)

In *Hoag*, the FEHC considered a sex discrimination complaint that arose from a religiously affiliated hospital's refusal to allow a male nurse to work in the postpartum unit. The FEHC reversed course from its prior understanding of the exemption, stating it had "become convinced . . . that this interpretation of the religious exemption is far too broad, and runs contrary both to our obligation to interpret [FEHA] liberally to prevent and eliminate discrimination . . . and to the Constitutional injunctions against establishment of religion. We have determined, therefore, that the soundest rule is that a nonprofit organization should be exempt from [FEHA] if it can demonstrate not just that it is a religious organization, but also that the case in which it claims exemption involves the denial of a job for which practice of and belief in the religion of the organization is a legitimate, job-related requirement, on the ground that the person rejected does not adhere to that religion. Where this test is met, we see good cause to exempt the employer, as to that job. We can no longer see any justification for excusing employers which may be essentially religious in nature when they discriminate on religious grounds in jobs that do not require their religion, or when they discriminate in any job on the basis of race, sex, or other bases protected under [FEHA]." (*Hoag, supra*, No. 85-10, FEHC Precedential Decs. 1984-1985, CEB 14, p. 7.)

With reference to its own regulation providing that any organization holding tax-exempt status as a nonprofit religious organization is presumed not to be an employer under FEHA, the FEHC stated that this "presumption is part of a regulation which we now believe does not state the proper standard for [FEHA's] religious exemption"

and "is in the process of being repealed." (*Hoag, supra*, No. 85-10, FEHC Precedential Decs. 1984-1985, CEB 14, p. 8.)

The *Hoag* decision was incorrect on several counts. Despite the prediction that the regulatory presumption was in the process of being repealed, that regulation in fact remains effective to this date. (Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(5).) More importantly, the decision appears to reflect not what the Legislature *actually* set forth in the statutory language, but, rather, the FEHC's opinion of what, in an ideal statute, a religious-entity exemption *should* provide. First, the *Hoag* decision concludes that a religious entity may discriminate only where religion is a legitimate job-related requirement for the particular employee. In doing so, it does not even attempt to explain how this interpretation may be reconciled with the actual language of the statute, which conditions the exemption on the status of the employer rather than on the job held by the particular employee. The *Hoag* decision concludes, moreover, that even if a religious entity qualifies for the exemption, the exemption shields the entity only from claims of religious discrimination. This limitation flies in the face of the express terms of section 12926, subdivision (d), which provides that all qualifying religious entities are excluded from the definition of "employer" under FEHA, with no reference to the nature of the violations alleged against them.

Although courts ordinarily give substantial weight to the FEHC's construction of the statutes under which it operates (*Robinson, supra*, 2 Cal.4th at pp. 234-235 & fn. 6), we will not do so where the agency's interpretation is "clearly erroneous or unauthorized" (*Cuadra v. Millan*

(1998) 17 Cal.4th 855, 870; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309). Because the *Hoag* decision cannot be reconciled with section 12926, it is not useful authority.[4]

Amicus also suggests that we interpret the religious-entity exemption by reference to the religious-entity exemption contained in title VII, the federal employment discrimination law originally enacted in 1964 (42 U.S.C. § 2000e et seq.). Although California courts have frequently looked to title VII jurisprudence to interpret analogous principles of California law, to do so here is inappropriate for several reasons, the most significant being that the language of the federal exemption is significantly different than the language of section 12926. Title VII exempts from its scope "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." (42 U.S.C. § 2000e-1(a).) Under title

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[4] Deference to the *Hoag* construction is particularly inappropriate in this case. As we noted in *Robinson*, an administrative construction is useful in determining legislative intent when the construction is "reasonably contemporaneous with the law's adoption." (*Robinson, supra*, 2 Cal.4th at p. 234.) The *Hoag* decision was not contemporaneous with the Legislature's adoption of the religious-entity exemption. Indeed, as noted above, a more contemporaneous FEHC interpretation of the exemption is found in the 1980 FEHC regulation providing that any organization holding tax-exempt status as a nonprofit religious organization is presumed not to be an employer under FEHA. (Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(5).)

VII, a religious organization may discriminate against any employee on religious grounds (*Corporation of Presiding Bishop v. Amos* (1987) 483 U.S. 327, 335-336), but may not discriminate on any other prohibited basis, such as sex or race (*Boyd v. Harding Academy of Memphis, Inc.* (6th Cir. 1996) 88 F.3d 410, 413 [sex]; *Rayburn v. General Conf. of Seventh-Day Adventists* (4th Cir. 1985) 772 F.2d 1164, 1166-1167 [sex and race]). Given the patent differences between the title VII exemption and section 12926, and the fact title VII was enacted five years *after* the predecessor to section 12926 went into effect in California, we cannot legitimately construe section 12926 by reference to 42 United States Code section 2000e-1(a).[5]

In light of the statute's unqualified exemption of religious entity employers, it is clear the relevant version of the religious-entity exemption is not limited so as to permit religious entities to discriminate, provided they do so solely on the basis of religion, nor is it limited to situations where the religious faith of the employee is a legitimate requirement of the relevant job. If Hospital is qualified as a "religious association or corporation not organized for private profit," (§ 12926, subd. (d)) it will be exempt from FEHA regardless of the nature of the

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[5] Even were we to do so, that the result would favor plaintiff's position is far from clear. Federal decisions have found numerous quasi-secular institutions to be exempt religious employers under title VII standards. (See, e.g., *Corporation of Presiding Bishop v. Amos, supra,* 483 U.S. 327 [gymnasium]; *Feldstein v. Christian Science Monitor* (D.Mass. 1983) 555 F.Supp. 974 [newspaper]; *E.E.O.C. v. Presbyterian Ministries, Inc.* (W.D. Wash. 1992) 788 F.Supp. 1154 [retirement home].)

employee's job or the type of discrimination it allegedly practiced.

This leaves plaintiff's most difficult argument: that the religious-entity exemption should not apply to Hospital because Hospital's primary function is the provision of health care and that function is insufficiently religious. While this argument has superficial appeal, it ultimately is irreconcilable with the words, structure and history of the relevant version of section 12926.

As previously noted, the religious-entity exemption applies to any "religious association or corporation not organized for private profit." (§ 12926.) No definition of the term "religious" is found in the statute, and we have not been presented with a definition from any source, legal or linguistic, that we may say for certain sets forth an accurate expression of the legislative intent behind this statute.[6] This is not surprising; few words in our language encompass such a broad range and nuance of

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[6] Plaintiff argues that a definition of "religious" may be drawn from *Bradfield v. Roberts* (1899) 175 U.S. 291, a case in which the United States Supreme Court held that a contract between the federal government and a religiously affiliated hospital did not violate the prohibition against the establishment of religion contained in the United States Constitution. This authority is not helpful here. We have no reason to believe that our California Legislature intended the words "religious association or corporation not organized for private profit" as used in the religious-entity exemption to be construed by reference to the constitutional analysis in *Bradford*, [sic] which applied entirely different concepts to inapposite language 60 years prior to the enactment of California's Fair Employment Practices Act (now FEHA).

potential meaning as the word "religion," and all available definitions are necessarily influenced by the context in which they arise.

This does not mean we can discern from the language itself no information about the meaning of the statute. Our task is not to define the word "religious" in the abstract, but rather to determine the Legislature's intent in exempting from FEHA any "religious association or corporation not organized for private profit." These words, taken together, have a different implication than the word "religious" standing alone. The term "corporation" would arguably be superfluous if, as plaintiff contends, the Legislature intended to exempt only those entities traditionally understood as churches and religious orders. At the very least, the exemption would be a remarkably inelegant way by which to designate such a limited class of institutions.

In addition, we may be reasonably certain from this language that, whatever their other characteristics, the religious entities to be exempted are not limited to religious organizations solely engaged in worship and proselytization of their faith. By specifically extending the exemption to religious "corporation[s] not organized for private profit" (§ 12926), the Legislature appears to have anticipated that at least some of the exempted religious employers would be corporations that engage in potentially remunerative activities, albeit not for private profit. This language cannot easily be reconciled with an interpretation that would limit the exemption solely to groups whose essential character and purpose is "religious," narrowly defined to mean engaged in activities relating only to active manifestation of devotion and obligation to a

supreme being. Although a purely religious group of the kind plaintiff envisions might potentially engage employees for the limited remunerative purpose of collecting donations and otherwise managing the incidental monetary exchanges necessary to support the worship activities of the group, that such groups provided the motivation for the Legislature's inclusion of the "religious corporation" aspect of section 12926 is unlikely. Such a group would already qualify for exemption as a "religious association" (*ibid.*); hence, adding to the exemption the additional words "or corporation not organized for private profit" would have been unnecessary.

That the Legislature had a broader intention when it chose the subject language is suggested by the provision's legislative history. As noted above, section 12926's predecessor statute, Labor Code former section 1413, subdivision (d), was enacted in 1959 to provide as follows: " 'Employer' does not include a social club, fraternal, charitable, educational or religious association or corporation not organized for private profit." (Stats. 1959, ch. 121, § 1, p. 2000.) By amendment in 1977, the Legislature eliminated the first four categories of exempted employers, leaving intact only the religious-entity exemption. (Stats. 1977, ch. 1019, § 1, p. 3055.) As the language describing the exempt religious entities remained unchanged, we must presume the Legislature did not intend in 1977 to alter the meaning of the religious-entity exemption from its original 1959 incarnation. Thus, our current understanding of "religious association or corporation not organized for private profit" must take into

account the presence of those other four exempted categories with which religious entities were associated in the 1959 statute.

The principle of *ejusdem generis* instructs that "when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. [Citations.]" (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011-1012.) Applied here, that principle suggests a broad reading of the religious-entity exemption in accordance with those other four broad categories with which religious entities once were listed.

That the 1959 Legislature would have considered religiously affiliated hospitals and other religiously affiliated quasi-secular entities any less worthy of exemption from FEHA than it did the great mass of social, fraternal, charitable and educational entities it chose to exempt at that time seems unlikely. To the contrary, the smorgasbord of exclusions in the 1959 statute appears to evidence a legislative unwillingness to impose a new and, at that time, potentially controversial remedial statute upon any group dedicated to social welfare, as opposed to private profit. Imposing plaintiff's implied qualification to the religious-entity exemption, moreover, would evoke similar questions for the other originally excluded categories. But no reason appears to believe the Legislature intended social clubs or fraternal organizations to lose their exemptions if their activities were not deemed exclusively "social" or "fraternal" under some dictionary definition. Nor does it seem likely the Legislature would have intended a qualification test for religious entities

alone, without drawing some distinction between religious entities and other exempted employers in the language of the statute.

Hospital was founded by members of the Methodist faith, is controlled by directors selected by a subgroup of the United Methodist Church, and operates under guidelines set by church associations. Health care is a social service that historically has been associated with religious groups, and plaintiff does not dispute that Hospital's founders were motivated by a sincerely held belief that healing the sick serves to advance the religious principles of the Methodist faith. None of the various facts set forth by plaintiff in opposition to the motion for summary judgment negates this demonstration of religious character.

For example, plaintiff argued that Hospital's nonreligious nature may be discerned from its articles of incorporation, which evidence that Hospital is controlled by the Methodist Church but do not formally define its purpose as religious in nature. We discern little point in parsing out and weighing every clause of Hospital's articles and bylaws. Suffice to say that other passages of those documents contain language arguably religious in character and, even if they did not, the omission of sufficient specific religious language in the articles does not negate the religious motivation underlying the creation and operation of the Hospital. "However wise or unwise it might be to require religious entities to identify themselves as such through their method of incorporation, in fact no such requirement exist[ed]" in the version of the statute relevant to this case. (*McKeon, supra,* 19 Cal.4th at

p. 329.) At that time, "[n]o provision of California law . . . preclude[d] a religious entity from describing its purposes as 'public or charitable' " rather than religious. (*Ibid.*) Similar reasoning applies to efforts to focus on a formal statement of purpose in the articles of incorporation; there is no statutory justification for exalting form over substance here.

Plaintiff relied on the facts that nearly half the members of the board may be non-Methodist and only one member of the board need be a Methodist minister. These facts merely evoke their corollaries: that at least half the members of the board *must* be Methodists, and the board must always have at least one Methodist minister. Plaintiff further noted that Hospital does not require its patients or employees to profess the Methodist faith. However, if those who created and control the Hospital themselves view healing the sick without regard to the patient's religious beliefs to be part of their religious purpose, then the religious beliefs of the patient are of little relevance in assessing the religious nature of the entity providing their care. Likewise, if Hospital's goal of healing the sick is to be conducted with maximum effectiveness, Hospital may find it necessary to hire whatever employees are most qualified or readily available to do the job, regardless of their religious affiliation. The employees' religious affiliations or lack thereof do not negate the religious nature of the entity that employs them.

Plaintiff also relied upon an "admission" by Hospital's administrative director of human resources, who acknowledged that Hospital's business is "[c]aring for the

health care needs of the community." The fact that Hospital's business may be so characterized by one employee in one context does not negate Hospital's religious nature. Indeed, one could equally well argue that the United Methodist Church has the capacity to fulfill a religious mission that includes healing the sick solely because the founders of the Hospital were motivated by their religious faith to create a vehicle with the capacity to care for the health care needs of the community. Amici curiae the California Catholic Conference, the Pacific Union Conference of Seventh-day Adventists, the Church State Council, the Council on Religious Freedom, Loma Linda University, Loma Linda University Medical Center and Adventist Health likewise assert that religious faith originally provided and continues to provide the underlying motivation for the establishment and maintenance of their numerous hospitals, schools and charitable organizations.[7]

That the 1959 Legislature was aware of the propensity of religious groups to advance their spiritual goals through the formation of separate institutions that some

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[7] This is not to say that a court is prohibited from questioning the truth of an entity's claim of religious belief. While it is generally inappropriate for a court to judge the truth or validity of a religious practice or belief, it is not illegitimate to inquire whether or not claims to religious belief are sincerely held or merely a sham put forth in an effort to avoid the reach of laws, such as FEHA and the tax codes, that would otherwise apply to the entity's detriment. (See, e.g., *United States v. Ballard* (1944) 322 U.S. 78.) While plaintiff does question whether Hospital legally qualifies as a religious entity, the sincerity of the Methodist belief that the provision of health care advances their religious mission is not at issue in this case.

might characterize as secular seems a reasonable assumption; therefore, to interpret the statutory language "religious association or corporation not organized for private profit" as having been crafted precisely in recognition of this propensity appears appropriate. (Stats. 1959, ch. 121, § 1, p. 2000.) Had the Legislature intended to draw a distinction between religious groups and the affiliated institutions they create in order to advance their goals, it could easily have used language that affirmatively drew such distinctions. The Legislature did not do so in 1959, nor in 1977 when it amended the exemption, nor in 1980 when it recodified the religious-entity exemption in section 12926 as part of FEHA.

Likewise, had the 1959 Legislature intended, in granting the religious-entity exemption, to differentiate among some institutions created by and affiliated with religious groups according to the type of service the institution provided, it more than likely would have articulated within the relevant version of the exemption some basis for religious groups to predict in advance whether a contemplated institution would or would not be exempt. Finally, had the Legislature intended the courts to undertake the difficult task of determining whether to permit particular religiously affiliated entities to claim the exemption, it more than likely would have provided some language within the statute itself to give the court a reasoned basis to draw the necessary distinctions. The relevant version of section 12926 is devoid of any such indications.

The mere fact that nonreligious organizations may also provide health care does not lead us to the conclusion the Legislature intended to exclude religiously affiliated hospitals from the religious-entity exemption. Indeed, if a religiously affiliated hospital is not sufficiently religious to claim the exemption, then what of a soup kitchen located in a church basement? It may be argued that the technical purpose of a soup kitchen is to provide food to the hungry rather than to make an immediate manifestation of devotion to a divine entity. Sustenance certainly may be obtained in the secular world outside the auspices of the church. Nevertheless, while providing food is an arguably secular function, the church's underlying motivation for feeding the destitute remains a matter of religious motivation and faith. Plaintiff's briefing provides us with no principled basis to draw a distinction between a soup kitchen and the Hospital under her interpretation of the relevant version of the religious-entity exemption.

Every religiously affiliated entity generally is both secular and religious to some extent, from small entities like soup kitchens and parochial schools to large organizations like religiously affiliated universities and the Christian Science Monitor. We are not prepared to hold that all of these are prohibited from qualifying as religious solely because their functions may be duplicated in some manner by secular institutions. Yet we have no reasoned basis to draw a distinction amongst these institutions, or between any of these institutions and the Hospital. The Legislature gave no indication that it intended the courts to attempt to parse out various levels

of religious sufficiency among the myriad types of religiously affiliated entities in order to determine when to apply the exemption, and provided us with no guidance on how to undertake such a difficult task. Absent any such indications or guidance, it is not appropriate for this court to create a religious sufficiency test out of whole cloth. We therefore read the relevant version of the religious-entity exemption as encompassing any entity with colorable religious motivation and substantial bona fide religious affiliations, including Hospital.

Amicus directs us to a decision from the State of Washington, *Hazen v. Catholic Credit Union* (1984) 37 Wash.App. 502, 681 P.2d 856 (*Hazen*). In *Hazen*, the Washington Court of Appeals held that a credit union organized to benefit Roman Catholics and employees of Roman Catholic institutions did not qualify as a "religious or sectarian organization not organized for private profit" so as to qualify for an exemption from the state employment antidiscrimination statute. (*Id.*, 681 P.2d at p. 857.) Using a dictionary definition of the words "religious" and "sect," the court concluded the credit union was not a religious organization that qualified for the exemption because "[w]e do not believe promoting thrift and providing a source of credit are manifestations of devotion to a superior being in a religious sense." (*Id.* at p. 858.)

Hazen is readily distinguishable from the present case. The statutory language of the Washington exemption encompassing any "religious or sectarian organization" is arguably more susceptible to an interpretation

limited to traditional religious groups than is the disjunctive "religious association or corporation" language utilized in FEHA. Moreover, the credit union seeking to claim the exemption in *Hazen* was very different than Hospital. The credit union was founded by lay people and had "no organizational, structural, or financial ties to the Roman Catholic Church or any diocese. The Diocese of Yakima receives no reports from the Credit Union and has no input regarding its operational, business, financial or management decisions. . . . [¶] The Credit Union's board of directors are chosen for their financial, business, or other management skills and not for their religious qualifications. No member of the Catholic clergy has ever served as a director of the Credit Union." (*Hazen, supra,* 681 P.2d at p. 857.)

Significantly, amicus curiae's brief omits discussion of subsequent authority from the State of Washington that makes clear Hospital would be considered an exempt entity under Washington law as well. *Farnam v. Crista Ministries* (1991) 116 Wash.2d 659 [807 P.2d 830] concerned an employment discrimination claim by a nurse in a religiously affiliated nursing home. The defendant was not a religious group per se, but rather a "nonprofit interdenominational Christian organization, which is a single corporate entity encompassing seven divisions, including schools, counseling services, radio stations and health care facilities." (*Id.*, 807 P.2d at p. 831.) The Washington Supreme Court concluded the defendant was a "religious or sectarian organization not organized for private profit" under Washington law and thus exempt from an employment discrimination claim. (*Id.* at p. 837.) The plaintiff in *Farnam* had argued that she was

employed by a subentity, the nursing home, that did not qualify for the exemption because nursing care is not a "religious purpose." In rejecting this argument, the court specifically criticized the *Hazen* decision for "unnecessarily" grafting a specific religious purpose test drawn from an unrelated tax statue [sic] onto the language of the antidiscrimination statute. (*Id.* at p. 838.)

Farnam was followed by yet another Washington State decision, this one specifically recognizing that a religiously affiliated hospital *is* a religious nonprofit organization exempt from the Washington antidiscrimination law. (*City of Tacoma v. Franciscan Foundation* (1999) 94 Wash.App. 663 [972 P.2d 566].) Thus, to the limited extent that Washington State law gives us assistance in interpreting the language of California's religious-entity exemption, that authority unequivocally holds that a religiously affiliated health care provider such as Hospital is qualified for, not disqualified from, Washington's arguably analogous religious-entity exemption.

Hospital qualifies as a "religious association or corporation not organized for private profit" as that category was likely understood by the 1959 Legislature that first crafted the applicable version of the religious-entity exemption (now § 12926, subd. (d)). For purposes of this action, Hospital is exempt from a claim for wrongful termination in violation of public policy based upon the public policy expressed in FEHA. Summary judgment was properly entered.

III. DISPOSITION

The judgment is affirmed.

WERDEGAR, J.

WE CONCUR:

GEORGE, C.J.
MOSK, J.
KENNARD, J.
BAXTER, J.
CHIN, J.
BROWN, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion Kelly v. Methodist Hospital of Southern California

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Unpublished Opinion
Original Appeal
Original Proceeding
Review Granted XXX 48 Cal.App.4th 1431
Rehearing Granted

Opinion No. S053888
Date Filed: May 11, 2000

Court: Superior

County: Los Angeles

Judge: Coleman A. Swart

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Law Offices of Steven Drapkin, Steven Drapkin; Proskauer Rose Goetz & Mendelsohn and Jeffrey A. Berman for the California Catholic Conference, the Pacific Union Conference of Seventh-day Adventists, the Church State Council, the Council on Religious Freedom, Loma Linda University, Loma Linda University Medical Center and Adventist Health as Amici Curiae on behalf of Defendants and Respondents.

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ALACOQUE COLETTE KELLY, Plaintiff and Appellant, v. METHODIST HOSPITAL OF SOUTHERN CALIFORNIA, et al., Defendants and Respondents.	B089833 (Super. Ct. No. GC 005963) (Filed Apr. 17, 1996)

APPEAL from a judgment of the Superior Court of Los Angeles County. Coleman A. Swart, Judge. Affirmed.

Melanie A. Calvert for Plaintiff and Appellant.

Herzog, Fisher, Flame & Grayson and David R. Fisher; Greines, Martin, Stein & Richland, Marc J. Poster, Robert A. Olson and Jennifer L. King for Defendants and Respondents.

Under the rationale stated in *Jennings v. Marralle* (1994) 8 Cal.4th 121, we conclude that because no state

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III and IV.

statute or constitutional provision other than the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)[1] bars age discrimination, there presently exists no "fundamental" public policy in this state which precludes age discrimination in employment by a non-profit religious corporation which is exempt from the FEHA.

We shall therefore affirm the summary judgment for the defendants.

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[1] All future statutory references are to the Government Code unless otherwise indicated.

Section 12920 provides: "It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age.

"It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.

"Further, the practice of discrimination because of race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability in housing accommodations is declared to be against public policy.

"It is the purpose of this part to provide effective remedies which will eliminate such discriminatory practices.

"This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state."

I

BACKGROUND

Plaintiff Kelly worked as a nurse at defendant Methodist Hospital of Southern California, from January 1985 to January 1, 1991, when she was terminated for failing to return to work after the expiration of her medical leave. After having granted five extensions of her medical leave, the hospital refused to grant a sixth extension and discharged Kelly for exceeding the allotted four months of medical leave.

Plaintiff, who was 50 years old when discharged, contends she was wrongfully terminated due to age discrimination. She asserts that most of the hospital's nurses are under 40 years of age, and that older nurses either have been terminated or forced into early retirement by onerous, intolerable, and burdensome working conditions.

Plaintiff contends her own working environment began deteriorating in February or March 1989, more than a year before her medical leave. She allegedly was called to work at night on short notice, given 16-hour shifts, and reprimanded for things beyond her control (such as being tardy and wearing the wrong color uniform when called to work on short notice, and failing to use a new charting method on which she was not trained).

The record shows, however, that plaintiff was repeatedly criticized for poor charting, tardiness, excessive

overtime, and wearing the wrong uniform prior to 1989, and as early as January 1986.

In 1990, the following events occurred: In May, plaintiff sustained a nonindustrial injury in a car accident and received medical care from a Dr. Vanis. On June 7, she received a written reprimand for excessive overtime and inappropriate charting. On June 14, she turned 50 years old. On June 20, a patient fell on her. On June 21, she received a written reprimand for failing to complete flow sheets, failing to check an apparatus, improperly documenting a glucose test, and not wearing a proper uniform. The June 21 reprimand also warned that any future reprimand would result in suspension or termination.

Shortly after being told that any future reprimand would be grounds for termination, plaintiff went on a medical leave of absence due to the flu and a nonindustrial back injury sustained in the May car accident. Her last day of work was June 24. On June 29, she submitted a leave of absence request form for June 24 to July 16.

The printed portion of the leave of absence request form stated in part that all leaves of absence are without pay, and that failure to return to work within three days following expiration of the leave is grounds for termination. In filling out that form on June 29, plaintiff did not ask for a workers' compensation disability leave based on an industrial injury. (It is undisputed that for industrial injuries, the hospital's policy is to extend the workers' compensation disability leave for the duration of the disability.) Instead, she asked for a medical leave, which she knew covered only non-industrial injuries. Medical

leaves for non-industrial injuries are subject to a four-month limitation, absent a showing of extenuating circumstances. (Plaintiff never asked for an extension based on extenuating circumstances.)

Plaintiff received state disability payments from June 1990 to June 1991, which she knew were payable for non-industrial illnesses or injuries only. She never requested to discontinue her state disability payments.

On July 12, Dr. Vanis filled out a form, which the hospital received, indicating that plaintiff's injury was non-industrial and that plaintiff thought she had the flu.

On July 12, plaintiff asked for and received an extension of her medical leave to July 31.

On July 23, Dr. Vanis told plaintiff that the results of her latest medical test were consistent with the type of industrial injury she would have sustained on June 21 when a patient fell on her, rather than the non-industrial injury she had sustained in the May car accident.

On July 23 and 31, plaintiff orally notified the hospital that she had an industrial injury, and asked to be put on workers' compensation leave. Dr. Vanis also notified the hospital by telephone that plaintiff had an industrial injury. He allegedly was told, however, that the hospital would not change the status of plaintiff's medical leave to workers' compensation leave. It is undisputed that the hospital's mere knowledge of plaintiff's claim that she had an industrial injury was insufficient to effectuate a change in her leave status.

At plaintiff's request, the hospital extended her medical leave to August 22, and again to October 1. On

October 15, plaintiff submitted another extension request which asked to extend to November 19 what she now called for the first time her "Workers' Comp[ensation]" leave. The hospital extended her medical leave, but did not switch her to workers' compensation leave.

On November 19, plaintiff requested to extend to December 19 what she reverted to calling her "Medical Leave." (After she signed this request, someone else circled the words "Workers' Comp." on the form.) The hospital did not switch plaintiff to workers' compensation leave status, and refused to extend her medical leave beyond December 19.

When plaintiff failed to return to work following the expiration of her medical leave, the hospital decided to terminate her effective January 1, 1991, and notified her by letter dated December 20. Plaintiff contends she did not receive the notice of termination until January 14, 1991. Thereafter, Dr. Vanis notified the hospital, for the first time in writing, that plaintiff had an industrial injury. Plaintiff's termination, however, had already occurred.

Although plaintiff was eligible for reinstatement, she never applied for reinstatement. She contends she fell into a severe depression as a result of her termination and, due to the depression, remained disabled as of April 8, 1994. (It is unclear whether she remains presently disabled.)

Plaintiff filed a lawsuit against the hospital and her nursing supervisor, Ellen Blackstock. The operative pleading, the third amended complaint, alleged causes of action for breach of implied in fact employment contract,

breach of the covenant of good faith and fair dealing, wrongful termination in violation of public policy, and fraud and deceit.

The trial court granted the defendants' motion for summary judgment and entered summary judgment. This appeal followed.

II

FEHA'S NONPROFIT RELIGIOUS CORPORATION EXEMPTION

Plaintiff contends she has a common law cause of action for wrongful discharge in violation of the state's fundamental public policy against age discrimination as expressed in the FEHA.

In *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, the Supreme Court recognized an exception to the general rule that unless otherwise agreed by the parties, an employment is terminable at will. That exception applies when the termination is "for an unlawful reason or a purpose that contravenes fundamental public policy." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094.)

Other than the FEHA, "no law of this state . . . proscribes discrimination on the basis of age." (*Jennings v. Marralle, supra,* 8 Cal.4th at p. 132.) In order to allege a state common law claim for wrongful discharge in violation of public policy, plaintiff must, under *Jennings,* establish that the hospital is subject to the FEHA's ban against age discrimination. *Jennings* held that because the small employer in that case was exempt from the FEHA's ban on age discrimination (§ 12926, subd. (d)

[exemption for employers of less than five persons]), and because no other state laws proscribe age discrimination, the exempt small employer could not be held liable for wrongful discharge in violation of a public policy against age discrimination. (*Jennings v. Marralle, supra,* 8 Cal.4th at pp. 129-136.)[2]

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[2] The *Jennings* court stated that because, other than the FEHA, "no other statute or constitutional provision bars age discrimination, . . . there presently exists no 'fundamental policy' which precludes age discrimination by a small employer." (*Jennings v. Marralle, supra,* 8 Cal.4th at p. 125.) As for all other employers, however, the *Jennings* court expressly declined to decide whether age discrimination in employment violates a "fundamental" public policy actionable in tort under *Tameny v. Atlantic Richfield Co., supra,* 27 Cal.3d 167, and its progeny (*Rojo v. Kliger* (1990) 52 Cal.3d 65; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654; *Gantt v. Sentry Insurance, supra,* 1 Cal.4th 1083). (*Jennings v. Marralle, supra,* 8 Cal.4th at p. 130.)

Although Division Five of this District held, in a 1983 decision that preceded *Rojo v. Kliger, supra,* 52 Cal.3d 65, "that there is no 'common law' cause of action for alleged age discrimination [citation]," (*Strauss v. A.L. Randall Co.* (1983) 144 Cal.App.3d 514, 520), the California Supreme Court has never expressly stated whether it agrees with Strauss' holding. The Supreme Court's discussion of *Strauss* in *Rojo v. Kliger, supra,* 52 Cal.3d at pp. 81-82, was critical of *Strauss'* legislative intent analysis, but did not go so far as to overrule *Strauss,* choosing instead to distinguish *Strauss* on its facts because *Rojo* involved sex, not age, discrimination. (*Rojo v. Kliger, supra,* 52 Cal.3d at p. 82, fn. 10.) When the California Supreme Court decided *Jennings* in 1994, it mentioned *Strauss* and *Rojo,* but again expressed no opinion as to whether the holding in *Strauss* is correct. (*Jennings v. Marralle, supra,* 8 Cal.4th at p. 133.)

Recently, Division Three of this District called upon the California Supreme Court to decide whether there exists a fundamental public policy against age discrimination in employment which would serve as the basis of a *Tameny* action.

In this case, the hospital successfully moved for summary judgment on the ground that as a nonprofit religious corporation, it is not an employer covered by the FEHA's ban against age discrimination. Employers, as defined by the FEHA, do not include nonprofit religious associations or corporations (§ 12926, subd. (d)(1)). Title 2, California Code of Regulations, section 7286.5, subdivision (5) states that if an entity obtains tax-exempt status as a nonprofit religious association or corporation, there is a presumption that the entity is not an employer under the FEHA.

The hospital, a nonprofit, federal and state income tax-exempt corporation, was created, organized, and is governed (at least partially) by members of the United Methodist Church. Its articles of incorporation state that all of its assets are irrevocably dedicated to charitable and religious purposes. Upon dissolution, the hospital's assets will revert to the United Methodist Women.

The hospital's bylaws require that a majority of its board members belong to the United Methodist Church, and that at least one other board member must be a Methodist minister. By virtue of her office, the president

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(*Stevenson v. Superior Court* (1996) 42 Cal.App.4th 1243.) Division Three held in *Stevenson* that despite the *Jennings* court's disclaimer that it was not deciding whether such a fundamental public policy exists, the *Jennings* court's sweeping language had flatly foreclosed any possibility of a *Tameny* cause of action being stated for wrongful termination based on age discrimination. Citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, Division Three concluded that it was compelled by *Jennings* to conclude that no such fundamental public policy exists in this state.

of the United Methodist Women, California-Pacific Conference, automatically sits on the hospital's board. The Women's Society of Christian Service of the Southern California-Arizona Conference of the Methodist Church annually elects the hospital's directors. The board has a standing committee which oversees a chaplaincy program and doctor-clergy activities.

The hospital abides by the requirements of the Health and Welfare Ministry of the United Methodist Church and is accredited by the Certification Council of the United Methodist Church. A Methodist chaplain ministers to the hospital's patients, and the hospital broadcasts daily sermons to its patients' rooms.[3]

Plaintiff contends the above factors are insufficient to establish, as a matter of law, that the hospital is a nonprofit religious corporation. She points to several other factors which we mention below, but we conclude none is sufficient to create a triable issue of fact.[4]

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[3] The hospital contends that in 1978, the Fair Employment Practice Commission ("commission") (the predecessor to the Fair Employment and Housing Commission), determined that the hospital was not subject to the commission's jurisdiction due to its nonprofit religious corporation status. Plaintiff objects to this evidence on the ground that there is no competent evidence to show why the commission denied jurisdiction in 1978. We do not rely on this evidence.

[4] Summary judgment is appropriate only where no material issue of fact exists or where the record establishes as a matter of law that a cause of action asserted against a party cannot prevail. After examining the facts before the trial judge on a summary judgment motion, an appellate court independently determines their effect as a matter of law. (*Nicholson v. Lucas* (1994) 21 Cal.App.4th 1657, 1664.)

She states that according to the hospital's articles of incorporation, the hospital was established for the purpose of building and maintaining a hospital, which is not a primarily religious purpose. She contends the hospital's main purpose is primarily charitable or humanitarian, making it akin to the various nonprofit social, fraternal, charitable, and educational associations which are subject to the FEHA. She also points out that the hospital's federal income tax exemption is based on its charitable, rather than religious, purpose, and, thus, the hospital should not be presumed exempt from the FEHA under the regulations.

We agree that the above factors mentioned by plaintiff were found to be relevant in a 1985 decision by the commission in a sex discrimination case against a hospital ("Hoag Memorial") that had refused to allow a male nurse aide to work in the postpartum unit. (*Dept. of Fair Employment and Housing Com. v. Hoag Memorial Hospital Presbyterian* (1985) FEHC Dec. No. 85-10.) Hoag Memorial, which was affiliated with a church, claimed that it was a nonprofit religious organization and, thus, exempt from the FEHA. The commission disagreed, finding that Hoag Memorial's primary purpose was secular rather than religious, and that the nurse aide position had nothing to do with religion. Announcing a new test, the commission stated that the nonprofit religious organization exemption would only apply when such an organization claimed the exemption as to a specific job that was related to the organization's religion.

We are not persuaded, however, that the commission has correctly enunciated the test for applying the exemption. Assuming that the term "religious organization" is

susceptible of more than one interpretation, at least where hospitals are involved, "the court will look to the legislative history of the FEHA [citation] and to administrative construction reasonably contemporaneous with the law's adoption in order to ascertain the intent of the Legislature in using the phrase. [Citations.]" (*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 234.)

As defendants point out, the Legislature considered, but rejected, a 1977 amendment to former Labor Code section 1413, subdivision (d), (presently codified at § 12926, subd. (d)), that would have limited the nonprofit religious organization exemption to jobs related to the organization's religious purposes. (Assem. Bill No. 1047 (1977-1978 Reg. Sess.) Mar. 22, 1977, § 1.) The legislative history materials supplied by defendants, whose request for judicial notice we granted, show that the proposed limitation was dropped from subsequent and final versions of the bill. (Sen. Amend. to Assem. Bill No. 1047 (1977-1978 Reg. Sess.) Aug. 24, 1977.) Instead, the Legislature retained the exemption which states that nonprofit religious corporations or associations are not employers covered by the FEHA. Significantly, in the same bill, the Legislature eliminated the exemption that had previously been afforded to social, fraternal, charitable and educational associations. Accordingly, we infer that the Legislature intended to retain the blanket exemption afforded to nonprofit religious organizations, without regard to the religious or secular nature of the particular job at issue in each case.

Where the Legislature considers and rejects certain statutory language, we may not adopt an interpretation

that reads the rejected language back into the statute. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 88-89; *Central Delta Water Agency v. State Water Resources Control Board* (1993) 17 Cal.App.4th 621, 632.) The commission's 1985 adoption of the rejected language (*Dept. of Fair Employment and Housing Com. v. Hoag Memorial Hospital Presbyterian, supra,* FEHC Dec. No. 85-10), was not reasonably contemporaneous with the Legislature's 1977 amendment to former Labor Code section 1413, subdivision (d). Moreover, the commission's 1985 decision contradicts, rather than explains the intent of the Legislature in preserving the exemption for nonprofit religious organizations.

We also disagree with plaintiff's contention that Corporations Code sections 9111 and 9130 are relevant to this case. Those sections, which were added in 1978 as part of the Nonprofit Religious Corporation Law ("the Law") and became operative on January 1, 1980, came well after the FEHA exemption at issue in this case was enacted in its original form,[5] and after the hospital in this case was incorporated.

The FEHA's exemption, when enacted in 1959 as former Labor Code section 1413, subdivision (d), stated in relevant part that " 'Employer' does not include a social

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[5] As stated in *Rojo v. Kliger, supra,* 52 Cal.3d at p. 72, "The California Fair Employment Practices Act (FEPA) was enacted in 1959 (former Lab. Code, § 1410 et seq.) and recodified in 1980 in conjunction with the Rumford Fair Housing Act (former Health & Saf. Code, § 35700 et seq.) to form the FEHA. (Stats. 1980, ch. 992, § 4, p. 3140 et seq.)"

club, fraternal, charitable, educational, or religious association or corporation not organized for private profit." (Stats. 1959, ch. 121, p. 2000, § 1.) It did not require the religious organization to have been organized primarily or exclusively for religious purposes, in contrast with Corporations Code sections 9111 and 9130; nor did it require the articles of incorporation to contain a statement to that effect, in contrast with Corporations Code section 9130, subdivision (b). Contrary to plaintiff's assertion, it bears no significance that the hospital's articles of incorporation failed to state that the hospital was being organized primarily or exclusively for religious purposes, given that the hospital was incorporated prior to the Law's enactment.

Moreover, it is far from clear that religiously affiliated hospitals serve a primarily secular purpose, as plaintiff contends. To many religious adherents, the healing of the sick is closely associated with faith in a divine being. Many hospitals, even those without an official religious affiliation, offer on-site chapels and chaplains for the spiritual comfort of their patients and their families. This hospital, in particular, broadcasts daily religious sermons to its patients' rooms. We are not prepared to hold, as a matter of law, that a religiously affiliated hospital may not define and carry out its mission of healing the sick as a primarily religious mission. In any event, it is unnecessary to decide that religious and philosophical question here.

We further note that because the FEHA's nonprofit religious organization exemption is so broad, it differs from the exemption found in Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2003 [sic] et seq.). Title

VII's prohibition against employment discrimination on the basis of religion is inapplicable to religious organizations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [an organization] of its activities" (42 U.S.C. § 2000e-1). In other words, Title VII's exemption focuses on whether the challenged discrimination is a religious activity of a religious organization and therefore within the limited exemption of that act. The FEHA's exemption, on the other hand, focuses solely on whether the employer is a nonprofit religious association or corporation and therefore not an "employer" within the meaning of the act (§ 12926, subd. (d)(1)). Accordingly, to the extent the various Title VII cases cited by the parties focus on whether the religious organization's challenged discrimination is a religious activity,[6] they do not help us to determine whether the hospital in this case is a nonprofit religious organization under the FEHA.[7]

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[6] See, e.g., *Little v. Wuerl* (3d Cir. 1991) 929 F.2d 944 [decision assumed that employer, a private Catholic school, was a religious organization, and focused on whether the school's discrimination against a non-Catholic employee who failed to conform to Catholic mores was exempt from Title VII]; *E.E.O.C. v. Presbyterian Ministries, Inc.* (W.D. Wash. 1992) 788 F.Supp. 1154 [decision stated that it could not seriously be disputed that a retirement home operated by a Christian denomination was created and operated for religious purposes, and focused on whether the home's discrimination against an employee who wore a Muslim headdress was exempt from Title VII].

[7] Similarly, *Speer v. Presbyterian Children's Home* (Tex. 1993) 847 S.W.2d 227, which was cited by the parties, is distinguishable because there, the judgment was vacated and the case dismissed as moot in an action filed under the Texas Commission on Human Rights Act.

While two other Title VII cases cited by the parties focus on whether the employer is a religious organization (*E.E.O.C. v. Townley Engineering & Mfg. Co.* (D. Ariz. 1987) 675 F.Supp. 566, affirmed in part & reversed in part, 859 F.2d 610 [Title VII's exemption inapplicable to a for-profit manufacturer of mining equipment whose only religious characteristic was the beliefs of its stockholders]; *Feldstein v. Christian Science Monitor* (D. Mass. 1983) 555 F.Supp. 974 [newspaper, which was subsidized by the First Church of Christ, Scientist, was held to be a religious activity of a religious organization, and thus permitted under Title VII to reject employment applications of non-Christian Scientists]), they offer no controlling authority for determining whether the hospital in this case is an exempt employer under the FEHA.[8]

In a contention raised for the first time in her reply brief, plaintiff alternatively contends that even if the hospital is an exempt employer under the FEHA, it is nevertheless subject to her common law cause of action for wrongful termination in violation of the federal government's public policy against age discrimination as expressed in the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 et seq.) and Title VII. Plaintiff contends these federal statutes, neither of which is mentioned in her complaint, preempt the FEHA.

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[8] Similarly, *Arriaga v. Loma Linda University* (1992) 10 Cal.App.4th 1556, which was cited by the parties, is distinguishable because the University's status as a nonprofit religious organization was not at issue. The question in that case was whether the University's receipt of state funds had caused it to lose its status as an exempt employer under the FEHA.

"We do not entertain issues raised for the first time in a reply brief, in the absence of a showing of good cause why such issues were not raised in the opening brief. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446[, 1453] . . . ; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8. . . .)" (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322.) Plaintiff provides no such showing here.

Even if we were to reach this issue, we do not think it has merit. Neither the ADEA nor Title VII was mentioned in *Jennings v. Marralle, supra,* 8 Cal.4th 121. Nevertheless, the California Supreme Court conclusively ruled that due to the absence of other California statutes prohibiting age discrimination, the exempt employer in *Jennings* was immune from a state common law cause of action for wrongful termination in violation of a fundamental public policy under *Tameny v. Atlantic Richfield Co., supra,* 27 Cal.3d 167, and its progeny. We believe the federal age discrimination statutes cannot supply the basis for a *Tameny* cause of action. (Cf. *Leathem v. Research Found. of City Univ.* (S.D.N.Y. 1987) 658 F.Supp. 651, 654, which rejected the plaintiff's state common law claim, stating that the plaintiff's ADEA claim "is a federal claim based on a federal statute and cannot also serve as a basis to expand an employee's remedies under New York State common law of tort.")

On this record, the hospital as the moving party presented sufficient evidence to show that plaintiff's *Tameny* cause of action lacks merit because the hospital is a nonprofit religious corporation that is not an employer covered by the FEHA. Plaintiff, to whom the burden of

proof shifted (Code Civ. Proc., § 437c, subd. (o)(2)), has failed to establish a triable issue of fact on that point.

Because we conclude, as a matter of law, that the hospital is a nonprofit religious corporation that is not subject to the FEHA's ban on age discrimination, we hold that under the controlling authority of *Jennings v. Marralle, supra,* 8 Cal.4th at pages 129-136, plaintiff has no common law cause of action against either the hospital or her supervisor for wrongful discharge in violation of public policy based on the FEHA.

III

Citing the hospital's policy to extend work-related disability leaves for the duration of the disability, plaintiff contends her termination constituted a breach of an implied in fact contract not to terminate her while she was suffering from a work-related disability. She also contends the hospital lacked good cause to terminate her employment, and that she was excused from performing under the contract due to her work-related disability.

Regardless of whether plaintiff was terminable at will or only for good cause, the facts simply do not support her contentions. When she was terminated, she was still on a medical leave of absence that had expired, and she never asked for an extension based on extenuating circumstances. Accepting that she learned on July 23, 1990, that Dr. Vanis believed her injury was work-related, she had ample time before her January 1, 1991, termination to submit such a medical report. She did not even bother, however, to submit a written statement from Dr. Vanis explaining the work-related nature of her injury until

after she was terminated. While plaintiff complains of the hospital's bad faith and malice in ignoring her and Dr. Vanis' verbal requests to switch her to workers' compensation leave, she alone created the situation whereby the hospital initially believed her injury was non-industrial. She was the one who applied for a medical leave based on a non-industrial injury; she was the one who submitted Dr. Vanis' written report that she had a non-industrial injury; she was the one who collected state disability benefits for a non-industrial injury; and she was the one who failed to submit a written medical report within a reasonable time after obtaining Dr. Vanis' revised diagnosis on July 23, 1990.

On this record, there is no evidence of a breach of contract, fraud, or bad faith. (See *Knights v. Hewlett Packard* (1991) 230 Cal.App.3d 775, 780-781.) It is irrefutable that the hospital exceeded its own medical leave policy by granting extensions beyond the four-month limit to an employee with a marginal performance record, who had applied for a medical leave within days of receiving a warning that a further reprimand would place her job in jeopardy, and then tried to claim an industrial injury without submitting supporting medical documentation. The hospital clearly acted in accordance with its policy by terminating plaintiff after she failed to return to work (or apply for an extension based on extenuating circumstances) within three days of the expiration of her six-month medical leave of absence.

Walker v. Blue Cross of California (1992) 4 Cal.App.4th 985, which plaintiff cites, is readily distinguishable. When the plaintiff in *Walker* commenced her medical leave, she was a 19-1/2-year employee who had left to have surgery

with the assurance that she could request an extension of up to 12 months with a supporting medical statement and company approval. While she was still on leave, however, the company changed its policy so that medical leaves beyond six months would not be permitted within an 18-month period. Under the new policy, the plaintiff's leave could not be extended beyond March 4, 1988. She returned to work on that date, but experienced swelling and discomfort in her ankle, which had not fully recovered from surgery. She submitted documentation of her physician's opinion that she should not return to work until April 7, 1988, and asked for an extension. She was terminated when she failed to return to work on March 14, 1988, as ordered, based on the new policy.

In this case, contrary to *Walker*, the hospital did not change its personnel policy during plaintiff's medical leave of absence. Unlike our plaintiff, the plaintiff in *Walker* submitted "documentation . . . on more than one occasion" of her physician's opinion that she should remain on medical leave for another month. (*Walker v. Blue Cross of California, supra*, 4 Cal.App.4th at p. 995.) Moreover, when the plaintiff in *Walker* commenced her leave, she had not just received a warning that another reprimand may lead to termination. Finally, this case is distinguishable from *Walker* because plaintiff remained disabled at least until April 8, 1994, almost four years after commencing her medical leave of absence.

We conclude, as a matter of law, that regardless of whether good cause was required, the hospital had ample cause to terminate plaintiff's employment, and her performance was not excused by a work-related disability.

IV

Plaintiff contends the summary judgment motion was not properly and timely served. According to her counsel, the moving papers (462 pages) were simply left on the floor outside her office in a public hallway after 5 p.m. on Friday, August 26, 1994, which was the last day to accomplish personal service within 28 days of the September 23 hearing. Counsel further contends that her mother was having open heart surgery during that time, which, when coupled with the improper and untimely method of service, reflects the growing trend of uncivil and ruthless behavior in the legal profession.

This objection, which plaintiff contends she never waived, was heard and rejected below in the form of an ex parte motion to quash service. At that hearing, plaintiff's counsel stated that before leaving her office on that Friday at 1:30 p.m., she had instructed the paralegal (Mr. Cossy) who was present in the suite that if the papers were served, he was to telephone her.

Defendants' messenger's declaration stated that the papers were left outside plaintiff's counsel's office by 4:50 p.m. Cossy's declaration stated that he was at the office at 4:50 p.m., and the papers were not served by that time. Plaintiff's counsel stated she did not find the papers outside the office until the next morning.

Noting that Code of Civil Procedure section 1011, subdivision (a) permits papers to be left, in the event no one is present to accept service, in a conspicuous place in the attorney's office between 9 a.m. and 5 p.m., and that

the parties were "quibbling over 20 minutes," the court concluded that on balance, the service was adequate.

Plaintiff admits that she filed written opposition to the summary judgment motion, appeared at the summary judgment hearing, and was able to bring Dr. Vanis' declaration to the court's attention even though there was insufficient time to incorporate it into her separate statement.

We conclude the record contains sufficient evidence to support the trial court's factual finding of timely service and, in any event, plaintiff has failed to establish prejudice.

DISPOSITION

We affirm the summary judgment and award defendants costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MASTERSON, J.

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

ALACOQUE B. COLETTE KELLY Plaintiff, v. METHODIST HOSPITAL OF SOUTHERN CALIFORNIA, ELLEN BLACKSTOCK and DOES 1 through 20, inclusive, Defendants.	CASE NO. GCO 05963 JUDGMENT BY COURT UNDER CODE OF CIVIL PROCEDURE SECTION 437c

(Filed Oct. 28, 1994)

This Court, having on September 23, 1994 granted the motion for summary judgment by Defendants Methodist Hospital of Southern California and Ellen Blackstock and having ordered ~~entry of~~ judgment as requested in said motion by formal Order dated October OCT 28 1994, 1994,

IT IS ORDERED, ADJUDGED AND DECREED that

Plaintiff ALACOQUE B. COLETTE KELLY shall take nothing, and that Defendants Methodist Hospital of Southern California and Ellen Blackstock shall recover from said Plaintiff, jointly and severally, costs of suit in the sum of $_____.

DATED: OCT 28 1994, 1994

/s/ Coleman A. Swart
Judge, Los Angeles
Superior Court
COLEMAN A. SWART

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

ALACOQUE B. COLETTE KELLY, Plaintiff, v. METHODIST HOSPITAL OF SOUTHERN CAI IFORNIA, ELLEN BLACKSTOCK and DOES 1 through 20, inclusive, Defendants.	) CASE NO: GC 005963) ORDER GRANTING MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS METHODIST HOSPITAL OF SOUTHERN CALIFORNIA AND ELLEN BLACKSTOCK AND AGAINST PLAINTIFF ALACOQUE B. COLETTE KELLY) TRIAL DATE: October 24, 1994 (Rendered moot by granting of Motion for Summary Judgment)

(Filed Oct. 28, 1994)

The Motion of Defendants' and moving parties' Methodist Hospital of Southern California and Ellen Blackstock for Summary Judgment or in the alternative Summary Adjudication came on regularly for hearing

before this Court at 8:30 a.m. on September 23, 1994 in Department A of the above-entitled Court located at 300 East Walnut Street, Pasadena, California. The Honorable Coleman A. Swart, Judge, presided.

Bruce M. Lorman, Esq., Of Counsel to Herzog & Fisher, a Professional Corporation, appeared as attorney for Defendants Methodist Hospital of Southern California and Ellen Blackstock. Melanie Calvert, Esq. appeared as attorney for Plaintiff Alacoque B. Colette Kelly. There were no other appearances.

After full consideration of the evidence, the objections thereto and the Separate Statements submitted by each party and the authority submitted by counsel, as well as oral argument by counsel, the Court found that there is no triable issue of material fact and no merit as to any and all of the claims and causes of action asserted in the Third Amended Complaint of Plaintiff Alacoque B. Colette Kelly and that Defendants Methodist Hospital of Southern California and Ellen Blackstock are entitled to summary judgment as a matter of law for the reasons set forth in Defendants' moving papers and for reasons as expressed on the record, which papers and record are hereby incorporated by reference, which include but are not limited to the following undisputed material facts and supporting evidence:

I. PLAINTIFF'S FIRST CAUSE OF ACTION FOR BREACH OF IMPLIED-IN-FACT EMPLOYMENT CONTRACT HAS NO MERIT.

A. There is No basis to Imply an Agreement that Plaintiff's Employment Would Continue Unless

There was Good Cause for Termination of Her Employment with Notice Thereof.

1. The Hospital's Handbook specifically provides that its "policies, practices, procedures, rules and regulations may change from time to time." (Kelly Depo., Exh. 5.)

2. There was no change in the policy on at-will employment from the time Plaintiff was hired until her employment was terminated. (Knudsen Depo., p. 14:9-p. 15:13.)

3. Plaintiff acknowledged in writing that "termination of employment can occur for a variety of reasons including . . . involuntary termination . . . " (Kelly Depo., p. I-24:8-12, Exh. 4, p. J-13 and Exh. 5; p. I-39:2-20; p. I-40:4-6; p. I-56:4-57:6; p. I-57:13-19; p. II-7:5-10; Knudsen Depo., p. 14:9-15:3.)

4. Plaintiff acknowledged in writing that "The Hospital's notice of termination policy is based upon the fact that the employment relationship is completely voluntary." (Kelly Depo., p. I-24:8-12, Exh. 4, p. J-13 and Exh. 5; Knudsen Depo., p. 14:9-15:3.)

5. Plaintiff acknowledged in writing that " . . . once established, the relationship may be terminated for any reason, or for no reason at all, by either the employee or the hospital." (Kelly Depo., p. I-24:8-12, Exh. 4, p. J-13 and Exh. 5.)

6. Plaintiff admitted that no one ever told her that she was not an at-will employee. (Kelly Depo., p. I-58; 2-9.)

7. Plaintiff admitted that no one ever told her that specific grounds were needed to terminate her employment (Kelly Depo., p. I-60:11-13.)

8. Plaintiff was never given any oral assurances that her employment would continue absent good cause for termination of her employment. (Kelly Depo., p. I-32:3-13; p. I-54:12-55:1; Inter. Resp. Nos. 1, 6).

9. Plaintiff was never given any written assurance that her employment would continue absent good cause for termination of her employment. (Knudsen Depo., p. 14:9-p. 15:13; Kelly Inter. Resp. Nos. 3, 4.)

10. Plaintiff was never given any implied assurances that her employment would continue absent good cause for termination of her employment. (Knudsen Depo., p. 68:18-69:14; also evidence in support of Facts 12-25 is incorporated herein.)

11. Plaintiff was employed as an at-will employee (Knudsen Depo., p. 14:9-15:13.)

12. Plaintiff was criticized in writing for charting and overtime in January, 1986. (Kelly Depo., p. I-66:20-67:5, Exh. 10.)

13. Plaintiff was criticized in writing for below standard job performance in charting and getting to work on time in January, 1987. (Kelly Depo., p. I-67:24-68:6, Exh. 11.)

14. Plaintiff was criticized in writing for below standard job performance in certain areas in March, 1988. (Kelly Depo., p. I-69:10-70:18, Exh. 12.)

15. Plaintiff was threatened in writing in March, 1988 with disciplinary action for failing to timely report for duty. (Kelly Depo., p. I-69:10-70:18, Exh. 12.)

16. Plaintiff was criticized in writing for below standard job performance in certain areas in July, 1989. (Kelly Depo., p. I-71:8-72:2, Exh. 13.)

17. Plaintiff was criticized in writing for below standard job performance in certain areas in February, 1990. (Kelly Depo., p. I-72:23-73:8, Exh. 14.)

18. Plaintiff was criticized in writing for below standard job performance in certain areas on June 7, 1990. (Kelly Depo., p. I-75:21-23, Exh. 15.)

19. Plaintiff admitted in writing in June, 1990 that her charting had been a problem. (Kelly Depo., Exh. 15.)

20. Plaintiff admitted that she was reprimanded in June, 1990 for not signing her time card and admitted that her conduct was not appropriate. (Kelly Depo., p. I-84:1-10.)

21. Plaintiff admitted that she sometimes came to work without the proper attire. (Kelly Depo., p. I-88:5-14.)

22. Plaintiff was criticized in writing and orally for below standard job performance in certain areas on June 21, 1990. (Kelly Depo., p. I-90:10-p. 95:13, Exh. 16.)

23. Plaintiff admitted that in June, 1990, she was warned that her employment could be suspended or terminated. (Kelly Depo., p. I-95:18-20.)

24. Plaintiff admitted that she was frequently counseled for tardiness. (Kelly Depo., p. II-153:21-p. II-155:14.)

25. Plaintiff admitted that she was criticized for not wearing the proper attire. (Kelly Depo., p. II-155:22-p. II-156:25.)

26. The evidence set forth in Plaintiff's papers does not raise any triable issue of fact because that evidence fails to rebut the presumption of at-will employment. Defendants' Evidentiary Objections to that evidence are well-taken and hereby granted.

B. Even Assuming that an Enforceable Implied in Fact Contract Existed, No Breach Occurred Because Good Cause Existed for the Termination of Plaintiff's Employment.

1. Plaintiff was involved in a car accident in May, 1990. (Kelly Depo., p. I-109:21-p. 111:25.)

2. Plaintiff was injured in her car accident in May, 1990. (Crowder Depo., p. 33:11-19.)

3. Plaintiff's doctor, Dr. Vanis, wrote that Plaintiff was unable to return to work for 1 to 2 weeks after July 12, 1990 due to a "non-industrial" [non-work related] accident. (Kelly Depo., p. I-121:17-to p. 123:10, Exh. 17; Complaint, ¶ 14-16.)

4. Plaintiff received state disability payments from June, 1990 to June, 1991. (Kelly Depo., p. I-129:4-8; p. II-58:12-13; Resp. to Req. for Adm. No. 10, 11.)

5. Plaintiff admitted that she was only entitled to obtain state disability payments for an illness or injury *not* caused by her job. (Kelly Depo., p. II-58:14-59:19 (also see Unemployment Ins. Code, § 2629).)

6. Plaintiff never requested that her state disability benefits be discontinued. (Kelly Depo., p. II-60:19-24.)

7. Plaintiff understood that a "medical" leave of absence was for an injury which did *not* occur on the job. (Kelly Depo., p. II-11:4-10.)

8. Plaintiff understood that a Worker's Comp "non-medical leave" was for an injury that occurred at work *on* the job. (Kelly Depo., p. II-11:11-13.)

9. Plaintiff admitted that she was familiar with the Hospital's procedures for requesting a leave of absence. (Kelly Depo., p. II-17:9-11.)

10. On June 29, 1990, Plaintiff requested a "medical" leave of absence from her job at the hospital due to her car accident. (Kelly Depo., p. II-22:19-p. 23:5, p. II-25:5-6; Exh. 23; Crowder Depo., p. 26:3-27:21, Exh. 228.)

11. In her written request for a leave of absence, Plaintiff agreed that if she failed to return to work within three (3) days following expiration of her leave, she may be terminated. (Kelly Depo., Exhs. 18, 19, 20, 21, 23, 24, 25, 26, 28, 29.)

12. Plaintiff's leave of absence expired on December 19, 1991. (Kelly Depo., Exh. 29.)

13. Plaintiff failed to return to work within three days of the expiration of her leave of absence. (Kelly Req. for Adm. Nos. 15, 16.)

14. Plaintiff admits that she was on a non-industrial, non-work related injury leave of absence at the time her employment was terminated. (Complaint, ¶¶ 14-16.)

15. The Hospital granted Plaintiff a "medical" leave of absence from June 24 through July 16, 1990. (Kelly Depo., p. II-17:17-18:8, Exh. 22.)

16. On July 12, 1990, Plaintiff requested in writing to extend her "medical" leave of absence from her job at the hospital. (Kelly Depo., p. II-26:1-12, p. II-27:16-17, Exh. 24.)

17. On July 30, 1990, Plaintiff requested in writing to extend her medical leave of absence from her job at the hospital. (Kelly Depo., p. II-28:7-19, p. II-29:17-18, Exh. 25.)

18. Plaintiff admitted that in order for the Hospital to change the status of her leave of absence from a "medical" to a "worker's comp" leave, her own notification to the Hospital was *not* sufficient. (Kelly Depo., p. II-30:15-22; p. II-40:12-15.)

19. On August 31, 1990, Plaintiff requested in writing to extend her "medical" leave of absence from her job at the Hospital. (Kelly Depo., p. II-31:8-21, Exh. 26.)

20. Plaintiff's doctor, Dr. Vanis, wrote that Plaintiff was unable to return to work until October 1, 1990, but she wasn't able to return to work by that date. (Kelly Depo., p. II-35:1-16, Exh. 27.)

21. On October 15, 1990, Plaintiff requested in writing to extend her leave of absence from her job at the Hospital. (Kelly Depo., p. II-38:6-22, Exh. 28.)

22. On November 19, 1990, Plaintiff requested in writing to extend her "medical" leave of absence from her job at the Hospital. (Kelly Depo., p. II-49:17-p.50:17, p. II-51:9-12, Exh. 29; p. II-90:8-10; Knudsen Depo. p. 115:2-25.)

23. Plaintiff *twice* admitted that the Hospital had a reasonable basis for treating her leave as a "medical" leave. (Kelly Depo., p. II-31:4-7; p. II-51:13-15; p. II-90:21-92:3.)

24. Plaintiff admitted that the Hospital did not terminate her employment to cut off her employee benefits. (Kelly Depo., p. II-70:25-71:4.)

25. Plaintiff admitted that the hospital did *not* have a policy of giving notice before termination of employment. (Kelly Depo., p. II-73:20-25.)

26. Plaintiff admitted that the Hospital's written policy provided that the maximum length of leave that would be granted for any medical disability was four (4) months. (Kelly Depo., p. II-75:2-10; p. II-95:4-14, Exh. 31.)

27. Plaintiff admitted that she was on a leave of absence for more than four months. (Kelly Depo., p. II-96:20-23.)

28. Plaintiff admitted that she never requested an extension of her leave of absence based upon extenuating circumstances. (Kelly Depo., p. II-100:6-9; Knudsen Depo., p. 132:8-17.)

29. Plaintiff was granted written extensions of her medical leave of absence from June 24, 1990 through December 19, 1990. (Blackstock Depo., Exh. 212 (8 pages).)

30. On or about November 19, 1990, Plaintiff's doctor wrote that she would be on total disability for about another month. (Crowder Depo. Exh. 235.)

31. On or about December 20, 1990, Plaintiff's doctor wrote that she could not return to work until January 21, 1991. (Crowder Depo. Exh. 235; Inter. Response No. 33.)

32. By letter dated December 20, 1990, the Hospital wrote to Plaintiff that her employment was being terminated for being on a medical leave of absence in excess of four months. (Blackstock Depo., p. 128:8-25, Exh. 209.)

33. On January 14, 1991, Plaintiff learned for the first time that her employment had been terminated. (Kelly Depo., p. II-82:20-25.)

34. The Hospital's employee, Ellen Blackstock believed that Plaintiff was on a medical leave of absence at the time her employment was terminated. (Kelly Depo., p. II-88:7-16; Blackstock Depo., p. 126:3-20; p. 139:16-18.)

35. At the time her employment was terminated, the Hospital believed that Plaintiff was on a non-work related "medical" leave of absence due to her car accident. (Crowder Depo. p. 31:10-23; p. 59:3-16; Knudsen Depo., p. 42:5-13, p. 46:23-47:1, p. 119:8-10.)

36. The Hospital believed it was Plaintiff's doctor's duty to determine if her injury was work related and so informed Plaintiff and her doctor. (Crowder Depo. p. 32:1-14; p. 33:23-34:2.)

37. Plaintiff received a written disciplinary report prior to going on her medical leave of absence. (Kelly Depo., p. I-55:7-17.)

38. The Hospital was not informed by Plaintiff's doctor that he believed that her injury was work related until *after* Plaintiff's employment had been terminated. (Crowder Depo., p. 35:10-p. 36:3; p. 108:8-15; Inter. No. 94.)

39. Plaintiff was not on workers' compensation at the time her employment was terminated. (Crowder Depo., p. 35:10-p. 36:3.)

40. Plaintiff's evidence fails to raise a triable issue that Defendants did not have good cause for termination. Defendants' Evidentiary Objections are well-taken and hereby granted.

2. Plaintiff paid at her own expense for her own health insurance, life insurance, disability and retirement benefits during her leave of absence prior to the termination of her employment. (Kelly Depo., p. II-128:14-p. II-131:22; Inter. No. 32; Knudsen Depo., p. 82:7-17; p. 117:8-118:13.)

3. Plaintiff was eligible to be rehired. (Knudsen Depo., p. 138:22-24.)

4. Plaintiff's Workers' Compensation claim against the Hospital stated that she could not return to work as a result of a back injury that she suffered while

employed at the Hospital until February, 1991. (Kelly Resp. to Req. for Adm. No. 14.)

5. Plaintiff's evidence fails to raise a triable issue of fact and Defendants' Evidentiary Objections are well-taken and hereby granted.

D. Even Assuming an Enforceable Contract Existed, Plaintiff did not Perform Her Obligations Pursuant to the Contract.

1. Plaintiff is not able to work. (Kelly Depo., p. II-63:16-25; Kelly Response to Request for Admission Nos. 15, 16.)

2. Plaintiff's evidence fails to raise a triable issue of fact and Defendants' Evidentiary Objections are well-taken and hereby granted.

E. Even if Plaintiff had been on a Work Related, Workers Compensation Leave of Absence, Her Employment Would Still be Terminated Because She Contends that She is Permanently Disabled.

1. Plaintiff contends that she is disabled. (Kelly Depo., p. II-90:1-6.)

III. PLAINTIFF'S SECOND CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING HAS NO MERIT.

1. The Court hereby incorporates by reference all of the grounds and reasons in Sections I and II hereinabove.

IV. PLAINTIFF'S THIRD CAUSE OF ACTION FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY HAS NO MERIT.

A. The Hospital is exempt from the Fair Housing and Employment Act's Prohibition on Age Discrimination.

1. The Hospital is a religious corporation not organized for profit. (Knudsen Dec., ¶¶ 1-7, Exh. A-D.)

2. The Fair Employment Practice Commission has determined that it has no jurisdiction over the Hospital. (Knudsen Depo., Exh. 222; Knudsen Dec. ¶¶ 1-7, Exh. A-D.)

3. Defendant Blackstock was not Plaintiff's employer. (Complaint, ¶ 5; Blackstock Depo., p. 4:20-5:13.)

4. Defendant Blackstock was the agent and employee of the Hospital. (Complaint, ¶ 5; Blackstock Depo., p. 4:20-5:13.)

5. Plaintiff's evidence fails to raise a triable issue of fact and Defendants' Evidentiary Objections are well-taken and hereby granted.

The Evidence cited by Plaintiff fails to raise a triable issue of fact for the reasons set forth in Defendants' Reply Separate Statement.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment is GRANTED and that judgment shall be entered on the Third Amended Complaint in favor of Defendants Methodist Hospital of

Southern California and Ellen Blackstock and against Plaintiff Alacoque B. Colette Kelly in this action.

DATED: October ___, 1994
OCT 28 1994

/s/ Coleman A. Swart
Judge, Los Angeles
Superior Court

COLEMAN A. SWART

Second Appellate District, Division One No. B089833
S053888

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

ALACOQUE COLETTE KELLY, Appellant

v.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA et al., Respondents

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(Filed Jun. 28, 2000)

Petition for Rehearing DENIED.

Request for modification and motion for stay of remittitur denied.

/s/ Brown
Acting Chief Justice

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

REMITTITUR

TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT DIVISION:ONE

ALACOQUE COLETTE KELLY, Plaintiff and Appellant, v. METHODIST HOSPITAL OF SOUTHERN CALIFORNIA et al., Defendants and Respondents.	S053888 Ct. App. 2/1 B089833 Los Angeles County Super. Ct. No. GC 005963

I FREDERICK K. OHLRICH, CLERK OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, DO HEREBY CERTIFY THAT THE ATTACHED ARE COPIES OF THE ORIGINAL JUDGMENT NOW FINAL ENTERED IN THE ABOVE-ENTITLED CAUSE ON THURSDAY, THE 11TH DAY OF MAY, 2000.

COSTS, IF ANY, SHALL BE AWARDED BY THE COURT OF APPEAL.

WITNESS MY HAND AND SEAL OF THE COURT, WEDNESDAY, THE 28TH DAY OF JUNE, 2000.

FREDERICK K. OHLRICH,
CLERK

BY /s/ Henrietta Miner
HENRIETTA MINER
DEPUTY [SEAL]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION 1

Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012

Kelly v Methodist Hospital Of So California
B089833
Los Angeles County No. GC005963

REMITTITUR

I, Joseph A. Lane, Clerk of the Court of Appeal of the State of California, for the Second Appellate District, do hereby certify that the attached is a true and correct copy of the original order, opinion or decision entered in the above-entitled cause on April 17, 1996 and that this order, opinion or decision has now become final.

REVIEW BY THE CALIFORNIA SUPREME COURT HAVING BECOME FINAL certified copies of the opinion and remittitur of the Supreme Court are attached.

Respondent to recover costs on appeal.

Witness my hand and the seal of the Court affixed at my office this
JUL 5 2000
Joseph A. Lane, Clerk

by: /s/ [Illegible]
Deputy Clerk

cc: All Counsel
File

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ALACOQUE COLETTE KELLY, Plaintiff and Appellant, v. METHODIST HOSPITAL OF SOUTHERN CALIFORNIA, et al., Defendants and Respondents.	B089833 (Super. Ct. No. GC 005963) (Coleman A. Swart, Judge) ORDER MODIFYING OPINION AND REHEARING DENIED (Filed May 7, 1996)

THE COURT:*

IT IS ORDERED that the opinion filed herein on April 17, 1996, be modified in the following particulars:

1. The paragraph appearing on pages 14-15, that begins with "We further note . . . ," and footnotes 6 and 7, are deleted in their entirety and replaced with the following:

We further note the cases cited by plaintiff that were decided under Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000(e) et seq.) do not help her

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III and IV.

position. Title VII's prohibition against employment discrimination on the basis of religion is inapplicable to religious organizations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [an organization] of its activities" (42 U.S.C. § 2000e-1(a)). Title VII's exemption was broadened in 1972 "to cover non-religious activities by the same groups." (*Little* v. *Wuerl* (3d Cir. 1991) 929 F.2d 944, 949.) To the extent the various Title VII cases cited by the parties assumed that the employer was a religious organization and focused on the scope of Title VII's exemption with regard to specific types of employee conduct,[6] they do not help us to determine whether the hospital in this case is a nonprofit religious organization under the FEHA.[7]

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[6] See, e.g., *Little* v. *Wuerl, supra,* 929 F.2d 944 [decision assumed that employer, a private Catholic school, was a religious organization, and focused on whether the school's discrimination against a non-Catholic employee who failed to conform to Catholic mores was exempt from Title VII]; *E.E.O.C.* v. *Presbyterian Ministries, Inc.* (W.D. Wash. 1992) 788 F.Supp. 1154 [decision stated that it could not seriously be disputed that a retirement home operated by a Christian denomination was created and operated for religious purposes, and focused on whether the home's discrimination against an employee who wore a Muslim headdress was exempt from Title VII].

[7] Similarly, *Speer v. Presbyterian Children's Home* (Tex. 1993) 847 S.W.2d 227, which was cited by the parties, is distinguishable because there, the judgment was vacated and the case dismissed as moot in an action filed under the Texas Commission on Human Rights Act.

This modification does not have an effect on the judgment.

Appellant's petition for rehearing is denied.

ORTEGA, Acting P.J. VOGEL (Miriam A.), J.

FEDERAL EQUAL EMPLOYMENT OPPORTUNITY LAWS

I. The Age Discrimination in Employment Act

29 U.S.C. § 621

"The Congress hereby finds and declares that – in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons; the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave; the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

"It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

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29 U.S.C. Code § 623

"It shall be unlawful for an employer – to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age; to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or to reduce the wage rate of any employee in order to comply with this chapter."

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29 U.S.C. § 630

"The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

II. Title VII of the Civil Rights Act

42 U.S.C. § 2000e-1

"This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

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42 U.S.C.§ 2000e-2(e)(2)

"Notwithstanding any other provision . . . (2) it shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association, or society or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion."

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42 U.S.C. § 2000e-7

"Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

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42 U.S.C.§ 2000h-4

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

CALIFORNIA EQUAL EMPLOYMENT OPPORTUNITY LAWS

Cal. Govt. Code § 12926(d):

"Employer" does not include a religious association or corporation not organized for private profit.

Cal. Govt. Code, § 12940(a):

> It shall be a unlawful employment practice . . . for an *employer*, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status or sex to refuse to hire or employ the person . . . or to bar or to discharge the person . . . or to discriminate against the person in . . . terms, conditions or privileges of employment. (emphasis provided).

Govt. Code, § 12941:

> It is an unlawful employment practice for an *employer* to refuse to hire or employ, or to discharge . . . any individual over the age of 40 on the ground of age. (emphasis provided).

Cal. Govt. Code § 12940(h)(3)(B):

> . . . *employer* does not include a religious association or corporation not organized for private profit. (emphasis provided).

Cal. Govt. Code § 12940(h)(1):

> It is an unlawful employment practice . . . for an *employer*, . . . because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex or age to harass an employee . . . (emphasis provided).

Govt. Code § 12920:

> It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex or age.

California Govt. Code § 12926.2 (Effective January 1, 2000)

> "As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:
>
> a) 'Religious corporation' means any corporation formed under, or otherwise subject to, Part 4 (commencing with Section 9110) or Part 6 (commencing with Section 10000) of Division 2 of Title 1 of the Corporations Code, and also includes a corporation that

is formed primarily or exclusively for religious purposes under the laws of any other state to administer the affairs of an organized religious group and that is not organized for private profit.

b) 'Religious duties' means duties of employment connected with carrying on the religious activities of a religious corporation or association.

c) Notwithstanding subdivision (d) of Section 12926 and except as otherwise provided in paragraph (1) or (2), 'employer' includes a religious corporation or association with respect to persons employed by the religious association or corporation to perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation.

(1) 'Employer' does not include a religious corporation with respect to either the employment, including promotion, of an individual of a particular religion, or the application of the employer's religious doctrines, tenets, or teachings, in any work connected with the provision of health care.

(2) 'Employer' does not include a nonprofit public benefit corporation incorporated to provide health care on behalf of a religious organization under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code, with respect to employment,

including promotion, of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care."

EQUAL EMPLOYMENT OPPORTUNITY LAWS OF OTHER STATES WHICH PROVIDE EXEMPTIONS FOR RELIGIOUS EMPLOYERS

I. Statutes which permit religious entities to discriminate on the basis of sex, race, age, national origin, religion, and disability. Exemptions provided for religious corporations. No similar exemption for other non-profit entities.

1. Arkansas Code Ann. § 16-123-103(a)

"The provisions of this subchapter relating to employment shall not be applicable with respect to employment by a religious corporation, association, society or other religious entity."

2. Colorado Rev. Stat. § 24-34-401(3)

" 'Employer' . . . does not mean religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing."

3. Connecticut Gen. Stat. § 46a-81p

"The provisions of the [Human Rights and Opportunities Act] shall not apply to a religious corporation, entity, association, educational institution or society with respect to

the employment of individuals to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom, or law which are established by such corporation, entity, association, educational institution or society."

4. Missouri Rev. Stat. § 213.010(7)

" 'Employer' . . . does not include corporations and associations owned and operated by religious or sectarian groups."

5. Utah Code Ann. § 34A-5-102(8)(b)(i) – (iii)

" 'Employer' does not include (i) a religious organization or association; (ii) a religious corporation sole; (iii) or any corporation or association constituting a wholly owned subsidiary or agency of any religious organization or association or religious corporation sole."

6. Washington Rev. Code § 49.60.040(3)

" 'Employer' . . . does not include any religious or sectarian organization not organized for private profit."

7. Wyoming Stat. § 27-9-102(b)

" 'Employer' . . . does not mean religious organizations or associations."

II. Statutes which permit religious entities to discriminate on the basis of sex, race, age, national origin, religion, and disability. Exemptions provided for religious corporations as well as other non-profit entities.

1. Alaska Stat. § 18.80.300(4)

" 'Employer' . . . does not include a club that is exclusively social, or a fraternal, charitable, educational or religious association or corporation, if the club, association, or corporation is not organized for profit."

2. Indiana Code § 22-9-1-3(h)

" 'Employer' . . . does not include (1)any nonprofit corporation or association organized exclusively for fraternal or religious purposes; (2) any school, educational, or charitable religious institution owned or conducted by or affiliated with a church or religious institution; or (3) any exclusively social club, corporation or association that is not organized for profit."

3. Kansas Stat. Ann. § 44.1002

(b) " 'Employer' . . . shall not include a nonprofit fraternal or social association or corporation."

(i) " 'Unlawful discriminatory practice' means: (1) Any discrimination against persons, by reason of their race, religion, color, sex, disability, national origin or ancestry. This term shall not apply to a religious or private fraternal and benevolent association or corporation."

4. Louisiana Rev. Stat. Tit. 23, § 302(2)(b)

   "This Chapter shall not apply to . . . employment of an individual by a private educational or religious institution or any nonprofit corporation, or the employment by a school, college, university, or other educational institution or institution of learning of persons having a particular religion if the school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of the school, college, university, other educational institution, or institution of learning is directed toward the propagation of a particular religion."

5. Montana Code Ann. § 49-2-101(11)

   " 'Employer' . . . does not include a fraternal, charitable, or religious association or corporation if the association or corporation is not organized either for private profit or to provide accommodations or services that are available on a nonmembership basis."

6. New Hampshire Rev. Stat. Ann. § 354-A:2(VII)

   " 'Employer' does not include a club exclusively social, or a fraternal, charitable, educational or religious association or corporation, if such club, association or corporation is not organized for private profit . . . "

III. Statutes permitting religious entities to discriminate only on the basis of religion. Religious entities are *not* allowed to discriminate on the basis of sex, race,

age, national origin or other prohibited, non-religious characteristics.

A. Statutes which permit preferences for co-religionists in religious activities only.

1. Kentucky Rev. Stat. Ann. § 344.090
2. Idaho Code § 67-5910(1)
3. Nebraska Rev. Stat. § 48-1103 (1)
4. Nevada Rev. Stat. § 613.320(2)
5. New Jersey Stat. Ann. 10:5-12(a)
6. Oklahoma Stat. Ann. Tit. 25 § 1307
7. Tennessee Code Ann. § 4-21-405

B. Statutes which permit preferences for co-religionists in educational institutions.

1. Arizona Rev. Stat. Ann. § 41-1463(F)(2)
2. Delaware Code Ann. Tit. 19, § 711(e)(2)
3. District of Columbia Law § 1-2503(b)
4. Idaho Code § 67-5910(2)(c)
5. Kentucky Rev. Stat. Ann. § 344.090(3)
6. Louisiana Rev. Stat. Tit. 23, § 332(H)(2)
7. Maryland Ann. Code Art. 49B, § 16(g)(3)
8. Nebraska Rev. Stat. § 48.1108(2)
9. Nevada Rev. Stat. § 613.350(4)
10. New Jersey Stat. Ann. § 10:5-12(a)
11. New York Executive Law Art. 15, § 296(11)

12. Oklahoma Stat. Ann. Tit. 25, § 1308(2)

13. South Carolina Codes Ann. § 1-13-80(I)(5)

14. South Dakota Codified Laws Ann. §§ 20-13-22

15. Tennessee Code Ann. § 4-21-405

16. Utah Code Ann. § 34A-5-106(3)(a)(ii)

C. Statutes which permit preferences for co-religionists in sectarian religious institutions. The employment cannot be connected with an unrelated commercial or business activity.

1. Oregon Rev. Stat. § 659.020(2)

> " . . . However, this section shall not be construed to prevent a bona fide church or sectarian religious institution, including but not limited to a school, hospital or church camp, from preferring an employee or applicant for employment of one religious sect or persuasion over another when: (a) That religious sect or persuasion to which the employee or applicant belongs is the same as that of such church or institution; (b) In the opinion of such bona fide church or sectarian religious institution, such a preference will best serve the purposes of such church or institution; and (c) The employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity which has no necessary relationship to the church or institution, or to its primary purposes."

D. Statutes which permit preferences for co-religionists in all activities.

1. Statutes applicable to religious corporations, associations, educational institutions and societies.

a) Arizona Rev. Stat 41: 1462

b) Maryland Ann. Code Art. 49B, § 18

c) Rhode Island Gen. Laws § 28-5-6(6)(ii)

d) South Carolina Codes Ann. § 1-13-80(I)(5)

e) Texas Lab. Code Ann. § 21.109(a)

2. Statutes which permit preferences for co-religionists in religious corporations, associations, educational institutions, societies and nursing homes which rely on treatment by prayer.

a) Illinois Ann. Stat. Ch. 775, § 2-101(B)(2)

" 'Employer' does not include any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or

non-profit nursing institution of its activities."

3. Statutes applicable to organizations which are owned, controlled, supervised by and/or operated by a religious institution or association.

   a) Wisconsin Stat. § 111.337(2)(a).

   " . . . it is not employment discrimination because of creed for a religious association not organized for private profit or an organization or corporation which is primarily owned or controlled by such a religious association to give preference to an applicant or employee who is a member of the same or similar religious denomination."

4. Statutes applicable to religious corporations and non-religious entities such as fraternal associations and charitable corporations.

   a) Delaware Code Ann. Tit. 19, § 710(3)

   " 'Employer' . . . does not include religious, fraternal, charitable or sectarian corporations or associations, except such corporations or associations supported, in whole or in part, by governmental appropriations." [This exemption does not apply to discrimination based on age, race, color or national origin].

   b) Maine Rev. Stat. Tit. 5, § 4553(4)

   " 'Employer' does not include a religious or fraternal corporation or

association, not organized for private profit and in fact not conducted for private profit, with respect to employment of its members of the same religion, sect or fraternity, except for purposes of disability-related discrimination, in which case the corporation or association is considered to be an employer."

c) Pennsylvania Stat. Ann. Tit. 43, § 954(b)

"The term 'employer' . . . does not include religious, fraternal, charitable or sectarian corporations or associations, except such corporations or associations supported, in whole or in part, by government appropriations." [This exemption does not permit discrimination on the basis of race, color, age, sex, national origin or non-job-related disability.]

IV. Statutes which permit religious entities to discriminate on the basis of religion when religion is a bona fide occupational qualification.

A. Florida Stat. Ann. § 760.10(8)(a).

B. Iowa Code § 216.6(5)(d)

Iowa Code § 216.9

C. Kentucky Rev. Stat. Ann. § 344.090(1)

D. Maryland Ann. Code Art. 49B, § 16(g)(2)

E. Minnesota Stat. § 363.02(1)(2)

F. Nebraska Rev. Stat. § 48-1108(1)

G. Oklahoma Stat. Ann. Tit. 25, § 1308(1)

H. Pennsylvania Stat. Ann. Tit. 43, § 955(a)

I. South Dakota Codified Laws Ann. § 20-13-18

J. Utah Code Ann. § 34A-5-106(3)(a)(i)

K. Wisconsin Stat. § 111.337 (2)

L. Vermont Stat. Ann. Tit. 21, § 495(a).

V. Statutes which permit religious entities to discriminate on the basis of religion or to make employment decisions which are calculated to promote the entity's religious principles. These statutes exempt institutions which are owned, controlled and/or operated by religious organizations.

A. District of Columbia Law § 1-2503(b)

B. Hawaii Rev. Stat. Tit. 21 § 378-3(5)

C. Massachusetts Gen. Laws Ann. Ch. 151B, §§ 1 and 4(18).

D. New Hampshire Rev. Stat. Ann. § 354-A:18

E. NY Executive Law Art. 15, § 296 (11)

F. Vermont Stat. Ann. Tit. 21, § 495(e)

CALIFORNIA RULE OF COURT 29(b)

Grounds for Review in Supreme Court:

"As a matter of policy, on petition for review the Supreme Court normally will not consider: (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal; (2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing."

PARTIAL LIST OF FEDERAL STATUTES CONTAINING RELIGIOUS ACCOMMODATIONS

7 U.S.C. § 1335 (1994)

Exemption of farms operated by religious institutions from marketing penalties under the Agricultural Adjustment Act.

7 U.S.C. § 1906 (1994)

Exemption of ritual slaughter from Humane Slaughter Act.

8 U.S.C. §1101 (1994)

Special rules for immigrants seeking to pursue religious vocations.

8 U.S.C. § 1448 (1994)

Religious belief exemption from requirement that naturalization petitioner take oath of renunciation and allegiance.

10 U.S.C. § 312 (1994)

Conscientious objector exemption from militia duty.

20 U.S.C. § 1681 (1994)

Exemption for religious educational institutions with contrary religious tenets from prohibition against sex discrimination.

26 U.S.C. § 501 (1994)

Religious exemption from tax on corporations.

26 U.S.C. § 2055 (1994)

Estate tax deduction for transfers for religious uses.

26 U.S.C. §2522 (1994)

Tax deduction for gifts made to religious organization.

26 U.S.C. § 3121 (1994)

Exemption of churches and qualified church-controlled organizations from requirement of employment taxes for old-age, survivors and disability insurance benefits.

26 U.S.C. § 3127 (1994)

Exemption for employers and their employees where both are members of religious faith opposed to participation in Social Security Act programs.

26 U.S.C. § 6033 (1994)

Special provisions concerning tax returns by exempt organizations, including religious organizations.

29 U.S.C. § 169 (1994)

Exemption of employee with religious convictions from requirement to join or financially support a labor organization.

42 U.S.C. §2000e-1(a) (1994)

Exemption of religious organizations from Title VII prohibition against religious discrimination.

42 U.S.C. § 2000e-2(e)(2) (1994)

Exemption of religious educational organizations from Title VII prohibition against religious discrimination.

42 U.S.C. § 3607 (1994)

Exemption of religious organizations from Fair Housing Act.

42 U.S.C. § 12187 (1994)

Exemption of religious organizations from Title I of Americans with Disabilities Act (employment).

PARTIAL LIST OF CALIFORNIA STATUTES CONTAINING RELIGIOUS ACCOMMODATIONS

Bus. & Prof. Code § 2063
Medical Practice Act (Bus. & Prof. Code § 2000 *et seq.*) requiring certification or licensure for the practice of medicine is not to be construed to interfere in any way with the practice of religion.

Bus. & Prof. Code § 2789
Religious school exemption from Nursing Practice Act.

Bus. & Prof. Code § 2731
Exemption from Nursing Practice Act for nursing in connection with practice of religious tenets.

Bus. & Prof. Code § 2800
Partial exemption of religious organizations and individuals from penal provision of Nursing Practice Act.

Bus. & Prof. Code § 2884
Exemption of religious training from Vocational Nursing Practice Act.

Bus. & Prof. Code § 21662
Article governing swap meets not generally applicable to religious organizations.

Code of Civ. Proc. § 425.14
Special showing required to bring claims for punitive or exemplary damages against religious organizations.

Const., Art. 13, §3 *et seq.*
Tax exemptions for property used for religious purposes.

Corp. Code § 9111
Special rules regarding incorporation of religious corporations.

Educ. Code § 8263

Religious belief exemption from physical examination or immunization requirement for admission to a child care and development program.

Educ. Code §§ 49406 and 87408.6

Religious belief exemption from tuberculosis examination.

Educ. Code § 76355

Religious exemption from health fee requirement.

Gov't Code §§ 3502.5 and 3546.3

Conscientious objector exemption from requirement that employee join or financially support public employee organization as a condition of employment.

Gov't Code § 12926(d)(1)

Exemption of religious organizations from employment discrimination provisions Fair Employment & Housing Act.

Gov't Code § 12940(h)(3)(B)

Exemption of religious organizations from anti-harassment provisions of Fair Employment & Housing Act.

Gov't Code §12955.4

Exemption of religious organizations from housing discrimination provisions of Fair Employment & Housing Act.

Gov't Code § 19261

Religious belief exemption from standards of health and safety.

Gov't Code § 65995

Developers fee exemption for facilities used exclusively for religious purposes.

Health & Safety Code § 1110.5 renumbered as 100930
Religious exemption from requirement of disease information reporting and medical treatment.

Health & Safety Code § 1569.31
Partial exemption for religious organizations from regulations prescribing standard of care.

Health & Safety Code §1709 renumbered as 109335
Exemption of faith healing from regulations regarding treatment of cancer.

Health & Safety Code § 3199 renumbered as 120605
Partial religious exemption from article regarding venereal diseases.

Health & Safety Code §3286 renumbered as 121370
Religious exemption from provisions regarding tuberculosis.

Health & Safety Code §3385 renumbered as 120365
Religious belief exemption from immunization requirement for admission to school.

Health & Safety Code §17005
Exemption of person employed incidental to training for religious vocation from definition of "employee" under the Employee Housing Act.

Health & Safety Code §25955(c) renumbered as 123420(c)
Exempts religious organizations from need to provide abortion services.

Ins. Code § 10494.2
Religious organization exemption from regulations governing life insurers.

Lab. Code § 1102.1
Religious organization exemption from prohibition of discrimination based on sexual orientation.

Pub. Util. Code § 98168

Conscientious objector exemption from requirement of joining or financially supporting a labor organization.

Pub. Util. Code § 130051.17

Exemption from general prohibition against acceptance of gifts of travel by members of the L.A. County Metropolitan Transportation Authority for travel provided by nonprofit religious organization.

Rev. & Tax. Code §§ 206 and 214 *et seq.*

Tax exemptions for religious organizations and societies.

Unemp. Ins. Code § 634.5(a)

Exclusion of service performed in the employ of a church or religious organization from definition of "employment" for purposes of unemployment insurance.

Unemp. Ins. Code § 1241

Provision for suit by church or religious organization to challenge denial of unemployment insurance exemption.

Unemp. Ins. Code § 2902

Religious exemption from requirement of contributions for disability compensation.

Welf. & Inst. Code § 7104

Exemption from medical or psychiatric treatment of persons depending on faith healing.

Welf. & Inst. Code § 14004

Exemption of individuals with religious objections to health care.

2nd Civil No.
BO089833

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ALACOQUE COLETTE KELLY, Plaintiff and Appellant, vs. METHODIST HOSPITAL OF SOUTHERN CALIFORNIA AND ELLEN BLACKSTOCK, Defendants and Respondents.	CASE NO. B089833 PETITION FOR REHEARING (Filed May 2, 1996)

Appeal From the Superior Court of Los Angeles County
The Honorable Coleman Swart,
Judge of the Superior Court
County of Los Angeles, State of California
L.A.S.C. No. GC 005963

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INTRODUCTION

Appellant, Alacoque Colette-Kelly, seeks rehearing from this Court's decision which affirmed summary judgment on her claim for wrongful termination in violation of public policy. The basis for this portion of the petition is that the Court failed to address a material issue of law. That issue is whether the "religious corporation" exemption under the Fair Employment and Housing Act ("FEHA") is constitutional.

Kelly contends that the "religious corporation" exemption in FEHA violates the First Amendment or Establishment Clause in the United States Constitution, which is made applicable to the States under the XIV Amendment of the United States Constitution. Moreover, Kelly submits that this same exemption violates the Establishment Clause in Article I, Section 4 of the California Constitution. Lastly, this "religious corporation" exemption violates the constitutional provisions for equal protection and the separation of powers between the legislature and the judiciary.

Good cause exists to consider these issues in view of the recent California Supreme Court decision in *Smith v. Fair Employment & Housing Commission*, 96 Daily Journal D.A.R. 4067 (April 11, 1996). In the *Smith* case, the Court held that a landlord could not claim an exemption from the Fair Employment & Housing Act based on her religious belief that sex outside of marriage was sinful. This newly decided case is a compelling justification for consideration of these important constitutional issues.

Appellant Kelly also seeks rehearing from this Court's decision which affirmed summary judgment on

her claims for breach of contract and breach of the covenant of good faith and fair dealing. The basis for this portion of the petition is that certain material facts appear to be misstated and/or omitted in the opinion.

DISCUSSION

I. THE EXEMPTION FOR RELIGIOUS CORPORATIONS UNDER FEHA IS UNCONSTITUTIONAL.

In a concurring opinion in *Smith v. Fair Employment and Housing Commission*, 96 Daily Journal D.A.R. 4067, 4079-4084 (April 11, 1996), Justice Mosk raised the compelling constitutional issues which are the subject of this petition for rehearing. In the first portion of his opinion, Justice Mosk discusses the establishment clause which states: "Congress shall make no law respecting an establishment of religion." Justice Mosk also notes that this prohibition is made applicable to state legislatures and state governments through incorporation in the due process clause of the Fourteenth Amendment to the United States Constitution. Similar proscriptions are in the California Constitution, Article I, Section 4.

In the case of Title VII, there is a balance in the conflict between the free exercise clause and the establishment clause. Since Title VII permits discrimination only on religious grounds, its limited purpose is to minimize governmental interference in the free exercise of religious decisions. In contrast, the FEHA exemption for religious corporations is overly broad and it actually promotes or encourages the adoption of a religious mission by every single secular corporation in California.

This is an abandonment of governmental neutrality towards religion.

If exemptions are overly broad, the law means nothing because everyone can claim an exemption. Such an interpretation encourages everyone to violate the law. For example, if a minister wearing a clerical collar wants to sexually harass his secretary, it would be permissible under the Fair Employment & Housing Act.

When courts allow employers to claim religious corporation exemptions, employees such as Kelly do not receive equal protection under the law. This is also unconstitutional.

Moreover, when a court is asked to decide whether a corporation is religious or not religious, it fosters excessive entanglement between church and state. In the context of the Religious Freedom Restoration Act (42 U.S.C. 2000bb), Justice Mosk noted that that federal statute may violate the separation of powers because it requires courts to pass on religious questions. *Smith v. Fair Employment and Housing Commission*, 96 Daily Journal D.A.R. 4067, 4079-4084 (April 11, 1996). For the same reasons, when a court is empowered to determine whether a corporation is truly a religious corporation, it violates the separation of powers and the separation of church and state. For these reasons, the religious corporation exemption under FEHA is unconstitutional . . .

* * *

SUPREME COURT NO. S053888

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ALACOQUE COLETTE KELLY,

Plaintiff and Appellant,

vs.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA AND ELLEN BLACKSTOCK,

Defendants and Respondents.

After A Decision By The Court of Appeal,
Second Appellate District, Division One
Case No. B0089833

L.A.S.C. No. GC 005963
The Honorable Coleman A. Swart

PETITION FOR REVIEW

(Filed May, 28 1996)

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ISSUES PRESENTED

1. Whether age discrimination in employment violates a fundamental public policy thereby permitting a common law cause of action for tortious wrongful discharge.

2. Under what circumstances may a corporation claim a "religious corporation" exemption from the provisions of the Fair Employment and Housing Act.

3. Whether the "religious corporation" exemption in the Fair Employment and Housing Act is pre-empted by federal law in Title VII of the Civil Rights Act and the Age Discrimination in Employment Act.

4. Whether the "religious corporation" exemption in the Fair Employment and Housing Act violates the establishment clauses in the United States Constitution and the California Constitution.

5. Whether the "religious corporation" exemption in the Fair Employment and Housing Act violates the equal protection clauses in the United States Constitution and the California Constitution.

6. Under what circumstances do employers have good cause to terminate employees who are on work-related disability leaves and under what circumstances is performance excused by written personnel policies.

WHY REVIEW SHOULD BE GRANTED

ISSUE NO. 1: Whether age discrimination in employment violates a fundamental public policy thereby permitting a common law cause of action for tortious wrongful discharge.

. . . The first issue arises in circumstances where Methodist Hospital is, arguendo, an exempt "religious corporation" under FEHA. That issue is whether public policy against age discrimination can be based solely on the ADEA?

ISSUE NO. 3: Whether the "religious corporation" exemption in the Fair Employment and Housing Act is pre-empted by federal law in Title VII of the Civil Rights Act and the Age Discrimination in Employment Act.

Federal law permits religious entities to discriminate only on the basis of religion and not on any other basis. 42 U.S.C. Section 2000e-1(a). 29 U.S.C. Section 630(b). In contrast, the Fair Employment and Housing Act purports to permit discrimination on the basis of sex, age, race, national origin, ancestry, color, disability, cancer-related medical condition, handicap, pregnancy and religion in circumstances where the employer is an "exempt religious corporation".

If the exemption under the Fair Employment & Housing Act is given this construction, it allows or permits acts of discrimination which are unlawful under Title VII and the ADEA and it is inconsistent with the federal objective of eliminating non-religious discrimination by religious entities.

This pre-emption issue raises important public policy questions which will impact the environment of the many employees who work in religiously affiliated institutions. The legal issue of preemption also has wide-reaching ramifications for all state laws which regulate an area subject to concurrent federal regulation.

ISSUE NO. 4: Whether the "religious corporation" exemption in the Fair Employment and Housing Act violates the establishment clauses in the United States Constitution and the California Constitution.

The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion". This prohibition is made applicable to the States pursuant to the Fourteenth Amendment. . . .

. . . While legislative bodies are constrained to pass no law which infringes on the free exercise of religion, these legislative bodies are similarly constrained to pass no law which promotes, advances or encourages the establishment of religion. While not all laws which exempt religious corporations are unconstitutional, government efforts to accommodate religion are permissible only when they are narrowly tailored to remove burdens on the free exercise of religion. . . .

. . . This is a significant legal issue which may have wide applications in other areas of law such as tax exemptions, zoning restriction laws and anti-solicitation statutes.

ISSUE NO. 5: Whether the "religious corporation" exemption in the Fair Employment and Housing Act violates the equal protection clauses in the United States Constitution and the California Constitution.

The Fourteenth Amendment, Section I of the United States Constitution provides: "No state shall deny to any person within its jurisdiction the equal protection of the laws". . . .

. . . Persons who work for exempt "religious corporations" do not receive equal protection under the state law which prohibits discrimination in employment. Persons who work for exempt "religious corporations" are also denied equal access to civil adjudication of their discrimination complaints in state court pursuant to FEHA. These are fundamental rights which trigger a level of intermediate scrutiny by the courts.

Under such a level of intermediate scrutiny, the religious corporation exemption is not narrowly tailored to protect the right to free exercise of one's religion. There is no compelling and no rational justification for permitting discrimination on the basis of sex, age, race, national origin, ancestry, color, disability, cancer-related medical condition, handicap and pregnancy in circumstances where the employer is an "exempt religious corporation".

* * *

Second Appellate District, Division One No. B089833
S053888

IN THE SUPREME COURT OF CALIFORNIA

ALACOQUE COLETTE KELLY, Appellant

v.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA et al., Respondents

---

[Filed Aug. 14, 1996]
Appellant's petition for review GRANTED.

George
Chief Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Brown
Associate Justice

Kennard
Associate Justice

_____
Associate Justice

SUPREME COURT NO. SO53888

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ALACOQUE COLETTE KELLY,

Plaintiff and Appellant,

vs.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA AND ELLEN BLACKSTOCK,

Defendants and Respondents.

After A Decision By The Court of Appeal,
Second Appellate District, Division One
Case No. B0089833

L.A.S.C. No. GC 005963
The Honorable Coleman A. Swart

APPELLANT'S OPENING BRIEF

(Filed Oct. 15, 1996)

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Attorney for Appellant
ALACOQUE COLETTE KELLY

SUMMARY OF ARGUMENT

The Fair Employment and Housing Act (hereinafter "FEHA") provides an exclusive exemption for non-profit religious corporations. The exemption is under-inclusive because it does not exempt other non-profit corporations. The exemption is also over-inclusive because it permits discrimination on the basis of sex, age, race, national origin, ancestry, color, disability, cancer-related medical condition, handicap, pregnancy and religion in circumstances where the employer is an exempt religious corporation.

This exemption is not narrowly drafted to protect a corporation's religious beliefs and practices or the right to select those employees who share its belief system. It is not narrowly drafted to protect a church's right to govern itself in ecclesiastical affairs. The breadth of this exemption violates the establishment clause in the state and federal constitutions.

This exemption also violates constitutional guarantees of equal protection under the law. Employees of "religious corporations" are denied a fundamental right to sue for discrimination in state court. The exemption also weighs heavily on those employees who fall in suspect classifications (race, sex, national origin and creed). Under strict scrutiny, this exemption is not the least restrictive means (or most narrowly tailored alternative) for accommodating the free exercise of religion.

This exemption is inconsistent with Title VII and the ADEA, both of which permit discrimination only for religious reasons in circumstances where the employer is a "religious entity". The exemption is pre-empted by these

federal laws and is unconstitutional by virtue of the Supremacy Clause. . . .

. . . Even if the Hospital were, arguendo, exempt from FEHA, it is nonetheless, subject to the ADEA. The public policy in the ADEA is an alternative basis for a wrongful termination suit. . . .

SUPREME COURT NO. SO53888

IN THE SUPREME COURT
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Plaintiff and Appellant,

vs.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA AND ELLEN BLACKSTOCK,

Defendants and Respondents.

After A Decision By The Court of Appeal,
Second Appellate District, Division One
Case No. B0089833

L.A.S.C. No. GC 005963
The Honorable Coleman A. Swart

APPELLANT'S REPLY BRIEF

(Filed Jan. 6, 1997)

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ALACOQUE COLETTE KELLY

V. THE EXEMPTION UNDER FEHA VIOLATES THE ESTABLISHMENT CLAUSES IN THE FEDERAL AND STATE CONSTITUTIONS.

. . . An exemption or benefit granted to both religious entities and secular entities is generally perceived as having a secular purpose because the benefit to religion is incidental to the purpose of the statute. Where, however, an exemption or benefit is granted exclusively to religious interests, a different analysis is applicable.

When an exemption is granted only to religious entities, it must be narrowly drafted to lift a discernible state-imposed burden on the free exercise of religious belief, practice or observance. *Texas Monthly v. Bullock* (1989) 489 U.S. 1, 15 [109 S.Ct. 890, 899, 103 L.Ed. 2d 1]. *Board of Education of Kiryas Village School v. Grumet* (1994) 512 U.S. 687 [114 S.Ct. 2481, 129 L.Ed.2d 546]. . . .

. . . In the subject case, the exclusive exemption granted to religious corporations is not narrowly drafted to lift a significant state-imposed burden on the free exercise of religion. The exemption does not merely allow the Hospital to advance religion or religious interests; it purports to permit discrimination on the basis of age, a course of conduct which has absolutely nothing to do with religion.

Respondents have argued that the exemption was granted to avoid government interference in a religious organization's internal affairs. This argument has no merit. Compliance with governmental regulations and monitoring of compliance by the government does not, necessarily, impede evangelical activities. *Texas Monthly v.*

Bullock (1989) 489 U.S. 1, 21 [109 S.Ct. 890, 903, 103 L.Ed. 2d 1].

More importantly, hospitals are operated as businesses open to the general public. The business of operating a hospital is not a religious ritual or practice. A prohibition against age discrimination would impose no burden on the free exercise of religion. The Hospital has made no claim that age discrimination is justified by religious belief. If landlords renting apartments to the public cannot discriminate against unmarried couples on the basis of religious belief, a hospital should be afforded no liberty to discriminate on the basis of "religious affiliation". *Smith v. Fair Employment & Housing Commission* (1996) 12 Cal. 4th 1143.

Respondents have also argued that no constitutional violation occurs when the government's action accommodates religion generally without favoring one sect over another sect. This is clearly incorrect. The United States Supreme Court has unequivocally rejected the contention that the establishment clause forbids only government preference of one religion over another. . . . In *Torcasco v. Watkins* (1961) 367 U.S. 488 [81 S.Ct. 1680, 1683, 61 L.Ed. 2d 982], the Court stated: "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally pass laws or impose requirements which aid all religions as against non-believers."

SUPREME COURT NO. SO53888

IN THE SUPREME COURT
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ALACOQUE COLETTE KELLY,

Plaintiff and Appellant,

vs.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA AND ELLEN BLACKSTOCK,

Defendants and Respondents.

After a Decision By The Court of Appeal,
Second Appellate District, Division One
Case No. B0089833

L.A.S.C. No. GC 005963
The Honorable Coleman A. Swart

RESPONSE TO AMICUS BRIEF OF CALIFORNIA CATHOLIC CONFERENCE, THE PACIFIC UNION CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE CHURCH-STATE COUNCIL, THE COUNCIL ON RELIGIOUS FREEDOM, LOMA LINDA UNIVERSITY, LOMA LINDA UNIVERSITY MEDICAL CENTER AND ADVENTIST HEALTH

(Filed March 27, 1997)

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ALACOQUE COLETTE KELLY

II. UNDER A FREE EXERCISE THEORY, THE HOSPITAL IS NOT ENTITLED TO AN EXEMPTION

Kelly submits that this Court should not imply an exemption for religiously affiliated hospitals. Such hospitals would be afforded no protection under a free exercise theory.

A. FREE EXERCISE ANALYSIS DETERMINES WHETHER AN INSTITUTION SHOULD BE GRANTED AN EXEMPTION.

A traditional free exercise analysis employs a balancing test to determine when a religious institution should be granted an exemption from a law. This test is articulated in *E.E.O.C. v. Fremont Christian School* (9th Cir. 1986) 781 F.2d 1362, 1367-1370. . . .

B. UNDER A FREE EXERCISE ANALYSIS, THE HOSPITAL HAS NO CLAIM TO PROTECTION.

1. Laws which prohibit age discrimination impose no free exercise burdens on religiously affiliated hospitals.

Laws which prohibit discrimination based on age, sex, race, national origin and other non-religious characteristics impose no burden on the free exercise of religious belief. The Hospital has made no claim that its religious tenets require age discrimination in employment. Even if the Hospital had made such a claim, the government's compelling interest in equal employment opportunity would outweigh any burden on religious belief. See, for example, *Bob Jones University v. United*

States (1983) 461 U.S. 574, 602-604, 103 S.Ct. 157, 76 L.Ed.157. (University asserted that its religious beliefs required discrimination based on race.)

2. Laws which prohibit religious discrimination impose no substantial burden on the free exercise rights of religiously affiliated hospitals.

The Hospital reasons that it is entitled to religious autonomy in its selection of employees who share similar views. Unfortunately, the rationale for church autonomy does not afford the same protection to church-affiliated entities who operate in the economic, secular arena. The U.S. Supreme Court has stated:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. *United States v. Lee* (1980) 455 U.S. 262, 102 S.Ct. 1051, 1057, 71 L.Ed. 2d 127.

While a hospital may have religious affiliations, it has entered the commercial arena by providing medical care to the public and its core or primary function is secular. Such hospitals should be held to the same standard as any other business. Routine regulatory inquiry into secular business decisions, made in the commercial arena, poses no danger of entanglement with religious doctrine, principles or tenets.

In the subject case, there is no requirement that nurses, doctors and other medical support staff profess any religious belief. There is no requirement that these employees satisfy any religious requirement imposed by the church. There are no church-imposed rules of conduct. The church does not appoint these employees. These employees do not preach, teach or interpret religious doctrines. Under these facts, the likelihood that government would be second-guessing an employment decision allegedly motivated by religious belief is non-existent. . . .

3. The government's compelling interest in equal employment opportunity outweighs any minimal and potential burden.

The government has a compelling interest in eliminating employment discrimination. When a free exercise burden is minimal, the state's interest in equal employment opportunities outweighs that burden. *E.E.O.C. v. Fremont Christian School* (9th Cir. 1986) 781 F. 2d 1362, 1369. Even in circumstances where the employer has asserted a religious motive for termination, the state's compelling interest outweighs the burden on free exercise. *EEOC v. Pacific Press Publishing Association* (9th Cir. 1982) 676 F. 2d 1272, 1280. (Title VII retaliation claim).

In the subject case, there is a potential that government *might* intercede in the Hospital's decisions to hire or terminate two chaplains. This possible burden on religious autonomy provides no safe harbor for employment discrimination against the other 1,248 Hospital employees. The minimal burden on free exercise is no

justification for permitting discrimination on the bases of age, race, sex, national origin and the other characteristics enumerated in FEHA. The government's compelling interest in eradicating employment discrimination outweighs the minimal nature of the burden on religious autonomy. . . .

Second Appellate District, Division One, No. B089833
S053888

IN THE SUPREME COURT OF CALIFORNIA

ALACOQUE COLETTE KELLY, Appellant

v.

METHODIST HOSPITAL
OF SOUTHERN CALIFORNIA et al., Respondents

(Filed May 12, 1999)

Construed as a request that review in the above entitled action be dismissed (Cal. Rules of Ct., rule 29(c)) and that the Court of Appeal's opinion be ordered published (*id.*, rule 976(d)), the suggestions to that effect by defendant Methodist Hospital of Southern California are denied.

The court will not hear argument on the following issues (Cal. Rules of Ct., rule 29.2(b)): (1) whether defendant breached a contractual obligation by discharging plaintiff (see Appellant's Opening Brief (AOB), at pp. 38-44; Respondents' Brief on the Merits (RB), at pp. 41-46); (2) whether a supervisory employee can be personally liable under FEHA or for wrongful discharge in violation of public policy (see AOB, at p. 18; RB, at pp. 29-30; see generally *Reno* v. *Baird* (1998) 18 Cal.4th 640); (3) whether the statute of limitations bars plaintiff's suit (see RB, at pp. 14-15; Appellant's Reply Brief, at pp. 6-7); (4) whether plaintiff may state a cause of action for

wrongful termination in violation of public policy (see generally *Tameny* v. *Atlantic Richfield Co.* (1980) 27 Cal.3d 167) based on the policy against age discrimination expressed in the Age Discrimination in Employment Act (29 U.S.C. § 621 et seq.; see AOB, at pp. 23-24; RB, at pp. 12-14).

GEORGE
Chief Justice

[SEAL]

SUPREME COURT OF CALIFORNIA

FREDERICK K. OHLRICH
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT
[Names and Addresses Omitted in Printing]

February 24, 2000

Ms. Melanie A. Calvert
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Re: **S053888 – Alacoque Colette Kelly v. Methodist Hospital**

Dear Counsel:

The Court has asked me to advise the parties that it expects the March 6, 2000, oral argument session in this cause to concentrate on the appropriate statutory interpretation to be given to Government Code section 12926, subdivision (d)(1). In light of the manner in which this case was litigated before the lower courts, the Court does not expect the parties to address the constitutional validity of section 12926, subdivision (d)(1), at that session.

Very truly yours,

FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court

/s/ Kenneth Wagovich
By: Kenneth Wagovich
Deputy Clerk

KW:sf

cc: William Quackenbush
David Fisher
Edward Tabash
Stephen Drapkin
Jeffrey Berman

TABLE OF CONFLICTS IN THE COURTS

1. COURT DECISIONS WHICH HELD THAT THE FIRST AMENDMENT (FREE EXERCISE AND/OR ESTABLISHMENT CLAUSE) DID NOT PRECLUDE CLAIMS FOR DISCRIMINATION BASED ON AGE, SEX, RACE, PREGNANCY, NATIONAL ORIGIN, SEXUAL ORIENTATION, RETALIATION AND/OR CLAIM OF SEXUAL HARASSMENT

U.S.Supreme Court Cases:

Dayton Christian Schools v. Ohio Civil Rights Commission, 477 U.S. 619, 628 (1986)-Although the Court reversed on grounds of abstention, a unanimous Court stated that the Ohio Civil Rights Commission violates no constitutional rights by merely investigating the circumstances of discharge in order to ascertain whether the ascribed religious reasons were, in fact, the reasons for discharge. (In response to a teacher's claims of sex discrimination and retaliation under the Ohio Civil Rights Act, the school asserted religious justifications that "mothers should stay at home with young children" and that plaintiff had violated "the Biblical chain of command by consulting an attorney").

2nd Circuit Cases:

Demarco v. Holy Cross High School, 4 F.3d 166 (2nd Cir. 1993)-A religious school argued that it terminated a teacher for failure to begin his class with prayer and failure to attend Mass with his class. The Court held that there were no entanglement concerns and that a teacher's suit for age discrimination suit, under the ADEA, could proceed against religious institution.

3rd Circuit Cases:

Geary v. Visitation of the Blessed Virgin Mary Parish School, 7 F.3d 324 (3rd Cir. 1993)-A religious school argued that a teacher had violated church doctrine by marrying a divorced man. The Court held that the Free Exercise Clause did not bar her suit for age discrimination under the ADEA.

4th Circuit Cases:

Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990)-The application of the FLSA to a church-operated school did not violate First Amendment rights. (Equal pay claim based on gender).

Ritter v. Mount St.Mary's College, 495 F.Supp.724 (D.Md. 1980). Affirmed, in part, reversed in part, in 738 F.2d 431 (4th Cir. 1984). Appeal, after remand, in 814 F.2d 986 (4th Cir. 1987). Teacher's claim for Title VII sex discrimination was not barred by First Amendment.

5th Circuit Cases:

E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980)-Neither the Free Exercise Clause nor the Establishment Clause barred faculty suit for Title VII discrimination based on race and sex.

E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981)-Title VII did apply to employment relationship between seminary and support staff because there was no violation of either the Free Exercise Clause or the Establishment Clause.

6th Circuit Cases:

Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000)- Religious school asserted that a teacher had violated its policy against premarital school [sic]. The Court held that teacher's claim of pregnancy discrimination could proceed under Title VII and the Ohio Civil Rights Act.

Ninth & O Street Baptist Church v. E.E.O.C., 633 F.Supp.229 (W.D.Ky. 1986). Affirmed in 802 F.2d 459 (6th Cir. 1986)- EEOC could investigate claim that church's early childhood center had discriminated against employees based on their religion. EEOC could investigate claim of retaliation.

8th Circuit Cases:

Roxas v. Presentation College, 90 F.3d 310 (8th Cir. 1996)- The resolution of a priest's claim for discrimination based on race, national origin, gender and age did not risk excessive entanglement under the First Amendment.

Weissman v. Congregation Shaare Emeth, 38 F.3d 1038 (8th Cir. 1994)-ADEA suit for age discrimination, brought by temple administrator, could proceed against religious institution.

9th Circuit Cases:

Bollard v. California Province of the Society of Jesus, 196 F.3d 940 (9th Cir. 1999)- Re-hearing denied in 211 F.3d 1331 (9th Cir. 2000)-The Free Exercise Clause and the Establishment Clause do not bar a priest's suit for Title VII sexual harassment.

E.E.O.C. v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986)-Title VII and Equal Pay Act applied to religious school and did not violate either the Free Exercise or the Establishment Clause.

E.E.O.C. v. Pacific Press Publishing Association, 676 F.2d 1272 (9th Cir. 1982)-Although the employer asserted a religious justification, that it had fired the employee for bringing a lawsuit in violation of church doctrine, the Court held that the First Amendment did not preclude Title VII claims for retaliation and sex discrimination against the employer, a religious publishing house.

Court of Appeals, District of Columbia:

Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1 (D.C.Ct.App. 1987)-First Amendment did not preclude suit by students of university, having both secular and sectarian characteristics, under the Human Rights Act for discrimination on the basis of sexual orientation.

District Court Cases:

Dolter v. Wahlert High School, 483 F.Supp. 266 (N.D. Iowa 1980)-The First Amendment did not preclude suit for Title VII sex discrimination by teacher at religious school.

E.E.O.C. v. First Baptist Church, 1992 WL 247584 (N.D.Ind. 1992)-Neither the Free Exercise Clause and nor the Establishment Clause preclude suit under the Equal Pay Act.

E.E.O.C. v. Tree of Life Christian Schools, 751 F. Supp. 700 (S.D.Ohio 1990)-Neither the Free Exercise Clause and nor the Establishment Clause preclude suit under the Equal Pay Act.

Elbaz v. Congregation Beth Judea, 812 F. Supp. 802 (N.D.Ill.1992)-First Amendment does not bar Title VII suit for discrimination based on sex and national origin.

Ganzy v. Allen Christian School, 995 F.Supp. 340 (E.D.N.Y. 1998)-Title VII claim for gender and pregnancy discrimination applies to sectarian school.

Grotke v. Canisius High School of Buffalo, New York, 1992 WL 535400 (W.D.N.Y. 1992)-ADEA claim could proceed because the First Amendment defense had no merit.

Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F.Supp.2d 849 (S.D.Ind. 1998)-The First Amendment does not preclude an ADEA suit for age discrimination.

Lukaszewski v. Nazareth Hospital, 764 F. Supp. 57 (E.D.Pa. 1991)-Free Exercise Clause does not preclude an ADEA suit for age discrimination.

Russell v. Belmont College, 554 F.Supp. 667 (M.D.Tn. 1982)-Application of the Equal Pay Act to a church-controlled college would not violate either the Free Exercise Clause or the Establishment Clause.

Shirkey v. Eastwind Community Development Corporation, 941 F.Supp. 567 (D.Md. 1996)-Race discrimination action under 42 U.S.C.§ 1981 was not barred by the First Amendment.

Smith v. Raleigh District of the North Carolina Conference of the United Methodist Church, 63 F.Supp.2d 694 (E.D.N.C. 1999)-Neither the Free Exercise Clause nor the Establishment Clause preclude suit for Title VII sexual harassment.

Soriano v. Xavier University Corp., 687 F. Supp. 1188 (S.D.Ohio 1988)-Free Exercise Clause does not preclude an ADEA suit for age discrimination.

Stouch v. Brothers of Order of Hermits of St. Augustine, 836 F.Supp. 1134 (E.D.Pa. 1993)-Free Exercise Clause does not preclude an ADEA suit for age discrimination.

Vigars v. Valley Christian Center of Dublin, California, 805 F. Supp. 802 (N.D.Cal. 1992)-Librarian could sue parochial school for Title VII pregnancy discrimination.

Whitney v. Greater New York Corporation of Seventh Day Adventists, 401 F.Supp. 1363 (S.D.N.Y. 1975)-The First Amendment did not preclude Title VII race discrimination suit against church. Caucasian woman had been terminated because of her social relationship with an African-American man. No evidence that discharge was based on doctrinal policies.

2. CONFLICTING COURTS WHICH HELD THAT THE FREE EXERCISE CLAUSE AND/OR ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT PRECLUDED CLAIMS FOR DISCRIMINATION BASED ON SEX, PREGNANCY, RACE, DISABILITY, AGE AND/OR RETALIATION AND/OR CLAIM OF SEXUAL HARASSMENT

4th Circuit Cases:

E.E.O.C. v. The Roman Catholic Diocese of Raleigh, North Carolina, 213 F.3d 795 (4th Cir. 2000)-Title VII claims for sex discrimination and retaliation barred by Free Exercise Clause.

Rayburn v. General Conference of Seventh Day Adventists, 772 F.2d 1164 (4th Cir. 1985)-Religion clauses precluded claims for Title VII sex and race discrimination claims.

5th Circuit Cases:

Combs v. Central Texas Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999)-Title VII claims for discrimination based on sex discrimination and pregnancy barred by Free Exercise Clause.

E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981)-Title VII was not applicable to employment relationship between seminary and faculty.

McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972)-Defined Salvation Army as "religious corporation". Held that Free Exercise Clause precluded claims for retaliation and sex discrimination.

Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999)-ADA claim for disability discrimination barred by Free Exercise Clause.

6th Circuit Cases:

Boyd v. Harding Academy of Memphis, Inc., 887 F.Supp.157 (W.D.Tn. 1995). Affirmed in 88 F.3d 414 (6th Cir. 1996). Suit for pregnancy discrimination barred by assertion that pre-school teacher had violated New Testament prohibition against premarital sex.

7th Circuit Cases:

Maguire v. Marquette University, 814 F.2d 1213 (7th Cir. 1987)-First Amendment precluded suit for Title VII sex discrimination.

Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994)-Free Exercise Clause barred Title VII suit for sex and race discrimination.

8th Circuit Cases:

Scharon v. St. Luke's Episcopal Presbyterian Hospital, 929 F.2d 360 (8th Cir. 1991)-Free Exercise Clause barred ADEA suit for age discrimination.

11th Circuit Cases:

Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000)-The Free Exercise and Establishment Clauses barred a Title VII suit for retaliation.

Court of Appeals, District of Columbia, Cases:

E.E.O.C. v. Catholic University, 83 F.3d 455 (D.C. 1996)-Free Exercise Clause barred Title VII sex discrimination suit.

Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. 1990) Free Exercise Clause barred ADEA suit for age discrimination.

District Court Cases:

Carter v. Baltimore Annual Conference, 1987 WL 18470 (D.D.C. 1987)-Suit for discrimination, based race and color under Title VII and 42 U.S.C.§ 1981, barred by Free Exercise Clause.

Cochran v. St. Louis Preparatory Seminary, 717 F.Supp. 1413 (E.D. Mo. 1989)-First Amendment barred application of ADEA to a church-operated school.

Himaka v. Buddhist Churches of America, 917 F.Supp. 698 (N.D.Cal. 1995)-Establishment Clause barred suit for sexual harassment, sex discrimination and retaliation under Title VII.

Powell v. Stafford, 859 F.Supp. 1343 (D.C.Colo. 1994)-Free Exercise Clause barred ADEA suit for age discrimination.

Sanchez v. Catholic Foreign Society of America, 82 F.Supp.2d 1338 (M.D.Fla. 1999)-First Amendment precluded suit for age discrimination under ADEA.

State Supreme Court Cases:

Van Osdol v. Vogt, 908 P.2d 1122 (Colo. 1996)-Title VII retaliation claim barred by the Free Exercise and Establishment Clauses.

3. CASES WHICH BROADLY CONSTRUE THE EXEMPTION FOR RELIGIOUS EMPLOYERS IN RELIGIOUS DISCRIMINATION SUITS

2nd District Cases:

Ticali v. Roman Catholic Diocese of Brooklyn, 41 F.Supp.249 (E.D.N.Y. 1999). Affirmed in 201 F.3d 432 (2nd Cir. 1999)-Parochial school could discriminate based on religion under Title VII.

3rd District Cases:

Little v. Wuerl, 929 F.2d 944 (3rd Cir. 1991)-A school argued that a teacher had not obtained an annulment of her first marriage and that her second marriage violated Catholic doctrine. The Court held that Title VII did not apply to the school's decision not to re-hire based on religious motivations.

6th Circuit Cases:

Hall v. Baptist Memorial Health Care Corporation, 215 F.3d 618 (6th Cir. 2000)-College of health sciences could discriminate on the basis of religion. (Title VII)

7th Circuit Cases:

Pime v. Loyola University of Chicago, 588 F.Supp.435 (N.D.Ill. 1984). Affirmed in 803 F.2d 351 (7th Cir. 1986)-Lecturer could not sue religious university for religious discrimination.

8th Circuit Cases:

Wirth v. College of the Ozarks, 26 F. Supp.2d 1185 (W.D.Mo.1998). Affirmed in 208 F.3d 219 (8th Cir. 2000)-College was "religious corporation" exempt from Title VII and the Missouri Human Rights Act.

10th Circuit Cases:

Larsen v. Kirkham, 499 F.Supp.960 (D.Utah 1980). Affirmed in 1982 WL 20024 (10th Cir. 1982)-Business college, a religious school, could discriminate on the basis of religion.

11th Circuit Cases:

Killinger v. Sanford University, 113 F.3d 196 (11th Cir. 1997)-Religiously affiliated university could discriminate on the basis of religion. (Title VII)

District Court Cases:

Dodge v. Salvation Army, 1989 WL 53857 (S.D.Miss. 1989). Salvation Army is exempt from Title VII. Victims assistance coordinator could not sue when her employer asserted a religious reason for termination.

E.E.O.C. v. Presbyterian Ministeries, Inc., 788 F.Supp. 1154 (W.D.Wa. 1992)-Retirement home, operated by Christian denomination, was exempt under Title VII and could discriminate on the basis of religion.

Feldstein v. Christian Science Monitor, 555 F.Supp. 974 (D.Mass. 1983)-Religious news publication could discriminate on the basis of religion.

Heintzelman v. St. Mary's Medical Center of Evansville, Inc., 1989 WL 247140 (S.D.Ind. 1989)-Medical center was exempt from claim of religious discrimination, under Title VII and the Indiana Civil Rights Act, filed by pastoral associate.

Myers v. Chestnut Hill College, 1996 WL 67612 (E.D.Pa. 1996)-College was exempt religious employer under Title VII and was entitled to discriminate on the basis of religion. See also fn.4 noting a difference between the 9th Circuit which construed the exemption narrowly and the 3rd Circuit which construed the exemption broadly in *Little v. Wuerl*, 929 F.2d 944 (3rd Cir. 1991).

Cases Decided By A State's Highest Court:

Farnam v. Crista Ministries, 807 P.2d 830 (Wash. 1991)-Nursing home was exempt religious employer under Washington's discrimination statute.

Murray v. Kobayashi, 431 P.2d 940 (Hawaii 1967)-Kamehameha Schools were exempt from Hawaii discrimination statute and could give preference to Protestant teachers.

Scheiber v. St. John's University, 638 N.E.2d 977 (Ct.App.N.Y. 1994)-University, operated in connection with church, was exempt from statute as a "religious

institution" and could discriminate against a Jewish vice-president on the basis of his religion.

4. CASES WHICH NARROWLY CONSTRUE THE EXEMPTION FOR RELIGIOUS EMPLOYERS IN RELIGIOUS DISCRIMINATION SUITS

Fourth Circuit Cases:

Fike v. United Methodist Children's Home of Virginia, Inc., 547 F.Supp. 286 (E.D.Va. 1982). Affirmed in 709 F.2d 284 (4th Cir. 1983)-Religiously affiliated home for "troubled" youth was secular organization and not exempt from claim of religious discrimination under Title VII.

Ninth Circuit Cases:

E.E.O.C. v. Kamehameha School/Bishop Estate, 990 F.2d 458 (9th Cir. 1993)-Title VII exemption does not apply to school which is merely affiliated with religious organization. Applicant was entitled to sue for religious discrimination.

E.E.O.C. v. Townley Engineering & Manufacturing Company, 859 F.2d 610 (9th Cir. 1988)-Court must weigh all significant religious and secular characteristics in determining whether an entity's purpose and character is primarily religious and, therefore, exempt from Title VII.

District Court Cases:

Seattle Pacific University v. Haas, 626 F.Supp. 539 (W.D.Wash. 1985)-Court allowed Title VII claim, filed by a warehouse applicant and based on religion, to proceed against religious university.

Cases Decided By A State's Highest Court:

Commission on Human Rights and Opportunities v. Archdiocesan School Office, 522 A.2d 781 (Conn. 1987). Appeal dismissed 484 U.S. 805 (1987). The lower court had held that the legislature never intended church-related schools to be subject to the state's discrimination statute. In reversing this decision, the Supreme Court held that the state commission could investigate claims of religious discrimination in order to determine if the teacher's discharge was based on a religious reason. There was no excessive entanglement under the First Amendment.

5. OTHER CASES IN WHICH COURTS HAVE ADDRESSED THE MERITS OF DISCRIMINATION CLAIMS AGAINST RELIGIOUS EMPLOYERS WITH NO DISCUSSION OF FIRST AMENDMENT ISSUES OR THE APPLICABILITY OF RELIGIOUS EMPLOYER EXEMPTIONS

District Court Cases:

Graves v. Methodist Youth Services, 624 F.Supp.429 (N.D.Ill. 1985)-Employee could sue church-operated social service organization for handicap discrimination under the Rehabilitation Act.

Maness v. Friendly Avenue Baptist Church Weekday Learning Center, 1993 WL 155375 (M.D.N.C. 1993)-Court addressed timeliness of ADEA claim brought against church kindergarten by a teacher.

Peterson v. Holy Cross Hospital, 1987 WL 9565 (N.D.Ill. 1987)-Employee could sue religious hospital for handicap discrimination under the Rehabilitation Act.

Piasecki v. Daughters of Jacob Nursing Home, Inc., 808 F.Supp. 1136 (S.D.N.Y. 1992)-Rabbi, also acting as mashgiach at a nursing home, was allowed to sue for age discrimination under the ADEA and the New York Human Rights Law.

Turner v. Barber-Scotia College, 604 F.Supp. 1450 (M.D.N.C. 1985)-The court addressed the merits of a retaliation claim and a race discrimination claim, under Title VII and 42 U.S.C.§ 1981, at a church-owned college.

Yost v. Western Pennsylvania-West Virginia Synod of Lutheran Church in America, 789 F.Supp. 191 (W.D. Pa. 1992)-Coordinator of planning and communications for organization of churches brought lawsuit for sex discrimination under Title VII.

6. COURTS WHICH HELD THAT THE FREE EXERCISE CLAUSE AND/OR ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT PRECLUDED OTHER EMPLOYMENT-RELATED CLAIMS

U.S. Supreme Court Cases:

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)-National Labor Relations Board cannot regulate labor relations between lay faculty and parochial schools. While the actual decision was based on the fact that Congress did not intend to bring religious schools within the jurisdiction of the Labor Board, this Court stated that the likelihood that the resolution of labor relations complaints would involve inquiry into the good faith of the

position asserted by clergy-administrators and its relationship to the school's religious mission created a potential for impermissible entanglement under the First Amendment.

1st Circuit Cases:

Natal v. Christian and Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989)-Free exercise clause precluded claim for wrongful termination by minister.

4th Circuit Cases:

Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328 (4th Cir. 1997)-First Amendment precluded claim for wrongful termination by minister.

6th Circuit Cases:

Hutchinson v. Thomas, 789 F.2d 392 (6th Cir. 1986)-Minister's claim that he had been forced into retirement was precluded by the First Amendment.

Lewis v. Seventh Day Adventist Lake Region Conference, 978 F.2d 940 (6th Cir. 1992)-First Amendment precluded civil review of wrongful discharge action by a minister.

District Courts:

Fraser v. Salvation Army, 1998 WL 13272 (E.D.Pa. 1998)-Suit for unjust termination barred by the First Amendment.

Isely v. Capuchin Province, 880 F.Supp.1138 (E.D.Mich. 1995)-Action for negligent hiring of priests, who molested student, was barred by First Amendment.

State Supreme Court Cases:

Clauder v. ABC Insurance Company, 563 N.W.2d 434 (Wisc. 1997). First Amendment precluded suit for negligent supervision of priest who had sexually exploited hospital's patients.

Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997)-First Amendment barred suit for negligent hiring and retention of priest who had allegedly molested boy.

Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985)-First Amendment barred suit by a homosexual against a church-published newspaper.

Marshall v. Munro, 845 P.2d 424 (Alaska 1993)-Breach of contract suit, brought by a minister, was barred by the First Amendment.

Miller v. Catholic Diocese of Great Falls, Billings, 728 P.2d 794 (Mon.1986)-Free exercise clause barred suit for tort of bad faith and fair dealing brought by a parochial teacher.

Music v. United Methodist Church, 864 S.W.2d 286 (Ky. 1993)-Breach of employment contract action filed by minister was precluded by establishment clause.

Pierce v. Iowa-Missouri Conference of the Seventh-Day Adventists, 534 N.W.2d 425 (Iowa 1995)-Breach of contract action, filed by a minister, was precluded by the First Amendment.

Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wisc.1995)-First Amendment barred suit for negligent hiring and retention of priest who had coerced parishioner into sexual relations.

Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Maine 1997)-First Amendment precluded claim for negligent supervision of priest who had sexual relations with someone else's wife.

7. COURTS WHICH HELD THAT THE FREE EXERCISE CLAUSE AND/OR ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT DID NOT PRECLUDE OTHER EMPLOYMENT-RELATED CLAIMS

2nd Circuit Cases:

Gargono v. Diocese of Rockville Centre, 80 F.3d 87 (2nd Cir. 1996)-Teacher could sue religious school for breach of contract.

6th Circuit Cases:

South Ridge Baptist Church v. Industrial Commission of Ohio, 911 F.2d 1203 (6th Cir. 1990)-The imposition of workers' compensation payment requirements violated neither the Free Exercise Clause nor the Establishment Clause of the First Amendment.

7th Circuit Cases:

United States v. Indianapolis Baptist Temple, 2000 WL 1141447 (7th Cir. 2000)-The religion clauses of the First Amendment do not protect temple from liability for federal unemployment taxes.

8th Circuit Cases:

Drevlov v. Lutheran Church, Missouri Synod, 991 F.2d 468 (8th Cir. 1993)-First Amendment did not bar minister's

claims for libel, negligence and intentional interference with legitimate expectation of employment.

State Supreme Court Cases:

Reardon v. Lemoyne, 454 A.2d 428 (N.H. 1982)-Court could decide nuns' employment dispute by reference to ordinary contract principles without inquiry into religious doctrine.

Welter v. Seton Hall University, 608 A.2d 206 (N.J. 1992)-Nun's breach of employment contract was not barred by the First Amendment.

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No. 00-0476

In The

Supreme Court of the United States

ALACOQUE B. COLETTE KELLY,

Petitioner,

vs.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA, ELLEN BLACKSTOCK and DOES 1 through 20, inclusive,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

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REASONS FOR DENYING THE WRIT

Confining itself to construing a California statute that has since been amended, the California Supreme Court held that respondent Methodist Hospital was a religious entity within the meaning of the state's Fair Employment and Housing Act's ("FEHA") former blanket exemption for nonprofit religious corporations and associations. The Court expressly declined to address any of petitioner's present constitutional challenges to the statute because she did not timely raise them below. As the California Legislature modified and restricted the exemption at issue while the case was pending, the Court's decision has limited application and is of little significance to anyone beyond the parties to this action.

Certiorari is wholly inappropriate here because: (1) The constitutional issues that are the focus of the petition were neither properly raised nor decided below; (2) the decision has limited precedential value since the operative statute has been modified; and (3) the decision – doing no more than construing the intended reach of a state remedial statute – is proper on the merits and has no federal constitutional implications. In short, petitioner has failed to make a "federal case" out of what was and always has been a state-law dispute about proper statutory construction, a dispute properly and finally resolved by California's highest court. For these reasons, respondent Methodist Hospital respectfully urges this Court to deny the Petition for Writ of Certiorari.

I.

PETITIONER DID NOT TIMELY PRESENT, NOR DID THE DECISION BELOW ADDRESS, THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION.

One of this Court's fundamental precepts is that it will not review constitutional issues that were not timely raised below. This precept is especially compelling as a matter of comity where a state's highest court has never been afforded the opportunity to construe that state's statutes in light of constitutional challenges. Petitioner here did not timely raise her constitutional challenges and the California appellate courts, therefore, properly did not address them.

Petitioner pleaded a state common-law, public-policy claim for age discrimination against Methodist Hospital after she was discharged because she failed to return to work at the expiration of an extended medical leave. (App. 3a.) Under governing California law no such state law claim lies against an employer who is exempt from FEHA. *Jennings v. Marralle*, 8 Cal. 4th 121, 135-36, 32 Cal. Rptr. 2d 275, 876 P. 2d 1074 (1994). Her complaint made no mention of any federal issue.

Methodist Hospital successfully moved for summary judgment on the ground that it was exempt from FEHA. Petitioner raised *no* federal issue in the trial court. (App. 54a-67a.)

The California Court of Appeal affirmed the judgment. (App. 3a-6a.) Petitioner's first reference to any federal statute appeared in her reply brief in the Court of Appeal, where she argued that the Age Discrimination in

Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., and Title VII, 42 U.S.C. § 2000e, et seq., preempted FEHA. (App. 45a.) Following longstanding California procedural rules, the Court of Appeal declined to entertain these arguments because petitioner failed to raise them in her opening brief. (App. 45a-46a.) *See, e.g., REO Broadcasting Consultants v. Martin*, 69 Cal. App. 4th 489, 500, 81 Cal. Rptr. 2d 639 (1999). In her petition for rehearing before the Court of Appeal, petitioner for the first time challenged California Government Code section 12926(d) on constitutional grounds. (App. 98a-101a.) Again, the Court of Appeal declined to consider any new arguments and denied the petition. (App. 71a-73a.) *See, e.g.*, Cal. R. Ct. 29(b)(1); *Conservatorship of Susan T.*, 8 Cal. 4th 1005, 1013, 36 Cal. Rptr. 2d 40, 884 P. 2d 988 (1994).

Petitioner renewed the issues she first raised in her appellate reply and rehearing briefs and raised additional new constitutional and other federal issues in her petition for review before the California Supreme Court. (App. 102a-106a.) Although initially not limiting the issues before it (App. 107a), that court later determined that it would not review any of petitioner's constitutional claims in light of the untimely manner in which petitioner had raised those issues. *See* Cal. R. Ct. 29.2(a) (California Supreme Court may limit issues that it will decide on review). Prior to oral argument, the court advised the parties that "[i]n light of the manner in which this case was litigated before the lower courts, the Court does not expect the parties to address the constitutional validity of section 12926, subdivision (d)(1), at that session." (App. 121a.)

Thus, the sole question before the California Supreme Court was whether Methodist Hospital – a nonprofit institution governed by the Methodist Church – fell within the statutory definition of a nonprofit "religious association or corporation" specifically exempted from FEHA, California Government Code section 12926(d). Relying on the applicable California legislative history, the court concluded that Methodist "Hospital qualifies as a 'religious association or corporation not organized for private profit' as that category was likely understood by the 1959 Legislature that first crafted the applicable version of the religious-entity exemption (now § 12926, subd. (d))." (App. 27a.)

The court reiterated "[b]ecause [the] arguments [concerning the constitutionality of the religious-entity exemption] were not properly preserved in the lower courts, we do not address them." (App. 2a n.3.) *See, e.g.*, Cal. R. Ct. 29(b)(1); *People v. Bransford*, 8 Cal. 4th 885, 893 n.10, 35 Cal. Rptr. 2d 613, 884 P. 2d 70 (1994); *People v. Cookson*, 54 Cal. 3d 1091, 1100, 2 Cal. Rptr. 176, 820 P. 2d 278 (1991). The California Supreme Court's decision, thus, hinged solely on principles of statutory construction and never once even considered petitioner's late-raised constitutional arguments. (App. 1a-29a.)

Petitioner's federal and constitutional concerns were first raised in an appellate reply brief, in an appellate rehearing petition, and in her petition for review to the California Supreme Court. Under established California procedure, the California appellate courts properly declined to address those issues. Petitioner's failure timely to raise any constitutional or other federal arguments – coupled with the California Supreme Court's

well-founded declination to address those late-raised issues – is reason alone to deny the petition. *E.g., Michigan v. Tyler*, 436 U.S. 499, 512 n.7, 98 S. Ct. 1942, 1951 n.7, 56 L. Ed. 2d 486 (1978) ("[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court"); *Street v. New York*, 394 U.S. 576, 582, 89 S. Ct. 1354, 1360, 22 L. Ed. 2d 572 (1969) ("this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary").

II.

IN LIGHT OF RECENT AMENDMENTS TO THE CHALLENGED STATUTE, THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS.

Even if petitioner had timely raised her constitutional arguments, this is not the proper case in which to resolve them. While this case was pending before the California Supreme Court, the Legislature substantially amended California Government Code section 12926(d), restricting the exemption to exclude, and thereby expanding state law to cover, nonprofit health care facilities, such as respondent Methodist Hospital, in most regards. California's FEHA law now limits the exemption of those institutions to the employment of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care. (App. 1a-2a.) In other words, the current statute would cover Methodist

Hospital with respect to its treatment of employees such as plaintiff.

Although the California Supreme Court's ordinary practice is to avoid issuing opinions concerning superseded statutory language, it decided to resolve this case due to the pendency of several other actions involving construction of the former statute. (App. 2a n.2.) But the pendency of a handful of actions – all within California – does not merit this Court's attention. The State's highest court and its appellate courts are fully equipped to deal with the few remaining cases that will be governed by the former version of Government Code section 12926(d). This Court need not waste its time adjudicating a matter of such limited importance.

III.

THE CALIFORNIA SUPREME COURT'S DECISION IS IN PRECISE ACCORD WITH AUTHORITY FROM THIS COURT.

In an effort to detract from both the untimeliness of her constitutional issues and the circumscribed nature of the decision, petitioner contends that the decision conflicts with authority from this Court as well as others. (Pet. 12-24.) Even assuming for the sake of argument that the federal constitutional issue were timely raised, she is wrong because she misconceives the nature of the California Supreme Court's decision. The California court did not decide that religious institutions always have to be exempted from anti-discrimination statutes or even that it is good public policy to exempt religious institutions from such state statutes. Rather, the issue the California

Supreme Court decided was simply whether the California Legislature intended to extend a remedial state statute to govern the conduct of religious institutions. Put in petitioner's constitutional context, had it been timely raised, the issue would have been whether the California Legislature was constitutionally required to affirmatively extend a remedial anti-discrimination statute to govern religious institutions.

The California Supreme Court undeniably decided, as the court of last resort on the issue, that the California Legislature – for a variety of valid reasons, including not interfering with constitutionally protected religious activities – decided not to extend this one remedial statute to religious entities. Since 1959, the California Legislature had excluded from FEHA's definition of an "[e]mployer" "a religious association or corporation not organized for private profit." (App. 18a.) On the basis of the state statute's legislative history, as well as the exemption's purposeful reference to both associations and corporations, the California Supreme Court concluded that the Legislature did not intend for "courts to attempt to parse out various levels of religious sufficiency among the myriad types of religiously affiliated entities in order to determine when to apply the exemption. . . . " (App. 24a-25a.) The Court therefore determined that the exemption should be construed "as encompassing any entity with colorable religious motivation and substantial bona fide religious affiliations, including [Methodist] Hospital." (App. 25a.)

Contrary to petitioner's suggestion, the California Legislature's choice falls squarely within what this Court has allowed.

First, under any test, exempting nonprofit religious entities from state regulation does not constitute the establishment of religion. (*See* Pet. 12-14, 19-22.) More than a decade ago, *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334-35, 107 S. Ct. 2862, 2867-68, 97 L. Ed. 2d 273 (1987), decided that issue. There, this Court held that exempting a church-run gymnasium from Title VII – a remedial, anti-discrimination law – did not violate the Establishment Clause. *See also Walz v. Tax Comm'n of New York*, 397 U.S. 664, 675, 90 S. Ct. 1409, 1415, 25 L. Ed. 2d 697 (1970) (property tax exemption for real property used exclusively for religious purposes did not violate Establishment Clause).

Second, this case does not even involve the question of whether a claim of religious autonomy constitutionally mandates a judicially-created exemption from laws which prohibit discrimination. (*See* Pet. 14-19.) Rather, this case involves whether a remedial statute that *expressly* does not extend to religious employers constitutionally has to be rewritten to extend where it never was intended to go. Petitioner's citations to cases involving claims under supposed statutory counterparts, such as the National Labor Relations Act ("NLRA"), are inapposite, as the NRLA contains no *statutory* religious-employer exemption. 29 U.S.C. § 152 (1998).

Third, contrary to petitioner's suggestion, limiting the scope of a remedial statute does not violate equal protection. (*See* Pet. 22-24.) Rather, excluding religious organizations from a remedial statute promotes a legitimate purpose: avoiding governmental interference and entanglement with religion. *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 338-39, 107 S. Ct. at 2870; *see also Gay*

Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 491, 156 Cal. Rptr. 14 (1979) (absence of a state law statutory remedy for employment discrimination based on sexual orientation did not deny homosexuals equal protection, because there is "no authority in support of the proposition that a remedial statute which affords a benefit to one or a number of historically aggrieved groups is unconstitutional if the same benefit is not afforded to all historically aggrieved groups").

Finally, there is no support for petitioner's contention that Title VII requires state laws to ban the same conduct that federal law bans. (Pet. 24-27.) *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 290 n.29, 107 S. Ct. 683, 694 n.29, 93 L. Ed. 2d 613 (1987) held that Title VII "pre-empt[s] only those state laws that expressly *sanction* a practice unlawful under Title VII; [it] does not pre-empt state laws that are silent on the practice." This Court rejected the notion that the state "would be required to incorporate every prohibition contained in Title VII into its state law, since it would otherwise be held to 'permit' any employer action it did not expressly prohibit." *Id.* FEHA's religious employer exemption does not sanction or approve any conduct barred under federal law; it is merely silent as to the same conduct violating Title VII. Had plaintiff sought to rely on the protections afforded by Title VII, and had she properly exhausted her administrative remedies under that statutory scheme, she could have brought her claims in federal court in the first place.

The California Supreme Court's decision does not raise any federal constitutional issues. The decision merely construes a remedial statute in accordance with its

plain language and permissible legislative purpose. There is no reason for this Court even to consider certiorari.

CONCLUSION

For the reasons set forth above, there is no reason for this Court to grant certiorari on issues that were not timely raised, will have no effect on the present statutory scheme, and have been long-resolved by this Court's own precedents. The petition should be denied.

Dated: October 27, 2000

Respectfully submitted,

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(3)

No. 00-0476

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In The

Supreme Court of the United States

ALACOQUE COLETTE KELLY,

Petitioner,

v.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA and ELLEN BLACKSTOCK,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

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REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue the writ of certiorari. The arguments asserted in Respondents' Brief in Opposition have no merit.

In the subject case, the state's highest court *did* have the opportunity to construe the state statute in light of constitutional challenges. The federal questions and constitutional issues, raised herein, were *all* raised in the California Court of Appeal, and again, in the California Supreme Court (App. 45a-46a; 98a-118a).

In fact, the California Supreme Court had ample opportunities to decide *all* of the federal and constitutional issues raised herein throughout the four years in which the case was pending in that Court. The California Supreme Court granted review on *all* of the issues raised herein (App. 107a). Approximately three years after granting review, the California Supreme Court advised the parties that it would not hear argument on whether the Age Discrimination in Employment Act ("ADEA") articulates a public policy basis for plaintiff's claim of wrongful termination (App. 119a-120a). Four years after granting review, and approximately *one week* prior to oral argument, the Court advised the parties that it did not expect the parties to address the constitutional validity of the FEHA exemption at that session (App. 121a-122a).

To be considered by this Court, federal claims must be *either* raised in, or considered and decided by, the state court. *McGoldrick v. Compagnie Generale Transatlantique,*

309 U.S. 430, 434, 60 S.Ct. 670, 84 L.Ed. 849 (1940). Petitioner has satisfied this burden by raising all of the federal questions and constitutional issues in the Court of Appeal and the California Supreme Court.

While failure to comply with a state procedural rule may constitute an independent and adequate state ground which would bar this Court's review of federal and constitutional questions, a state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." State courts may not avoid deciding federal issues by invoking procedural rules that do not apply evenhandedly to all similar claims. *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). In the subject case, the "procedural rules" cited by Respondents have not been applied evenhandedly by California state appellate courts and are not an adequate ground on which to deny review by this Court.

Although Respondents argue that the issues first raised in the reply brief in the California Court of Appeal were untimely, they are unable to and cannot cite any procedural rule of court or rule of civil procedure to support their position (Resp. Opp. 2-5). In fact, the California Court of Appeal frequently considers arguments first raised in reply briefs. *Adams v. Thornton*, 5 Cal.App. 455 (1907). *Davidson v. Roffy*, 40 Cal.App. 179 (1919). *California National Supply Co. v. O'Brien*, 51 Cal.App. 606 (1921). *Bardeen v. Commander Oil Co.*, 48 Cal.App.2d 355 (1941). *Rayner v. Ramirez*, 159 Cal.App.2d 372 (1958). *Guerrero v. Westgate Lumber Co.*, 164 Cal.App.2d 612 (1958). *Boyd v. Bevilacqua*, 247 Cal.App.2d 272 (1966). *Fox v. Federated Department Stores, Inc.*, 94 Cal.App.3d 867 (1979). *Carman v. Alvord*, 31 Cal.3d 318 (1982). *Luck v. Southern*

Pacific Transp. Co., 218 Cal.App.3d 1 (1990). *Soman Properties, Inc. v. Rikuo Corp.*, 24 Cal.App.4th 471 (1994). *Bockover v. Perko*, 28 Cal.App.4th 479 (1994). *Ochoa v. California State University, Sacramento*, 72 Cal.App.4th 1300 (1999). *People v. Conover*, 243 Cal.App.2d 38 (1966).

Although Respondents further argue that arguments first raised in the petition for rehearing were untimely, they are unable to and cannot cite any rule of court or rule of civil procedure which precludes appellate review of these issues (Resp. Opp. 2-5). In fact, California's state appellate courts frequently consider issues first raised in petitions for rehearing. *Lewis v. City and County of San Francisco*, 2 Cal.App. 112 (1905). *Ambrose v. Alioto*, 65 Cal.App.2d 362 (1944). *People v. Marine Products Co.*, 77 Cal.App.2d Supp. 929 (1947). *Traders & General Ins. Co. v. Pacific Employers Ins. Co.*, 130 Cal.App.2d 158 (1955). *Mounts v. Uyeda*, 227 Cal.App.3d 111 (1991). *Duffy v. Cavalier*, 215 Cal.App.3d 1517 (1989).

Although Respondents argue that the decision of the California Supreme Court was proper in declining to consider issues which had not been timely raised in the California Court of Appeal, the California Supreme Court has frequently considered and decided issues which were not even raised in the California Court of Appeal. *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317 (2000) (See fn. 16). *Broughton v. Cigna Healthplans of California*, 21 Cal.4th 1066 (1999) (See fn. 4). *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 6-7 (1998).

In the subject case, *all* of the federal questions and constitutional issues were timely raised in the California Court of Appeal. We have previously noted that legal

theories and questions of law may be first raised on appeal, under a "de novo" standard applicable to review of summary judgments (Pet. 7). California law also permits state appellate courts to consider constitutional issues first raised on appeal when they pertain to important issues of public policy (Pet. 7). California law further permits state appellate to consider legal issues first raised on appeal when there is an intervening change in law (Pet. 7-8). The authorities cited by Respondents are inapposite because they involve no issue of "de novo" review of summary judgment. Two cases were criminal cases. *People v. Cookson*, 54 Cal.3d 1091 (1991). *People v. Bransford*, 8 Cal.4th 885 (1994). The third case, *REO Broadcasting Consultants v. Michelle Edith Martin*, 69 Cal.App.4th 489 (1999), involved review of an administrative decision which had already been affirmed by the trial court. The fourth case, *T. Lake County Mental Health Dept. v. Susan T.*, 8 Cal.4th 1005 (1994), involved a motion to suppress evidence in a conservatorship proceeding. In sum, the authorities cited by Respondents do not establish a "long-standing" established rule of procedure which would bar review by this Court.

The issues in this case continue to have far-reaching implications. Despite recent amendments, the Fair Employment and Housing Act ("FEHA") continues to completely exempt parochial schools and religiously affiliated universities, retirement homes, day care centers, newspapers, radio stations, thrift stores and soup kitchens. The FEHA also continues to partially exempt religiously affiliated health care facilities, permitting these employers to discriminate against persons in executive and pastoral care positions on the basis of their sex,

age, race, national origin, ancestry, color, disability and religion. *Cal. Govt. Code*, § 12926.2 (App. 79a-81a).

As previously discussed, thirteen other states afford complete exemptions to religious employers, permitting them to discriminate on the basis of sex, age, race, national origin, ancestry, color, disability and religion (App. 81a-84a). The issues raised herein have wide applicability to many other statutes and they have arisen with increasing frequency in the lower courts (App. 84a-90a; 92a-97a; 123a-140a). As an example, the subject case was recently cited as authority, under SB 41, for permitting religiously affiliated hospitals to refuse contraceptive health insurance coverage to their employees. *California Lawyer, "Getting Religion"* (November 2000). Further, the issue of whether exemptions would undermine discrimination laws was raised in Congress during recent debates on the Religious Land Use and Institutionalized Persons Act of 2000 (S. 2689). (BNA) *Employment Discrimination Report* 15:5 at p. 146 (8/2/00). A decision by this Court would resolve the controversy inherent in these issues.

Lastly, Respondents argue that the California Supreme Court has merely construed the intended reach of a state remedial statute in a manner which is consistent with this Court's own decisions. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987). *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987). These issues have been addressed in the Petition and need not be reiterated here (Pet. 12-14; 22-27).

This not merely a decision in which the state's highest court has construed a state statute in accordance with

its plain language and "permissible" legislative purpose. Rather, the Court has adopted a construction which violates the United States Constitution. The Court has endorsed religion by unjustifiably and broadly favoring those employers, claiming religious missions and affiliations. The Court has treated persons employed by "religious employers" as "second-class" citizens, entitled to no protection from discrimination under state law. The Court has cast a blind eye to federal law. The Court's decision, as applied, violates the Establishment Clause, the Equal Protection Clause and the Supremacy Clause of the United States Constitution. These violations should not go unnoticed by this Court.

Respectfully submitted,

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